Supreme Court, U.S.
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No. 04-1255

IN THE

Supreme Court of the United States

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AND AYSEGUL AKAY,
Petitioners,

v.

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. Respondent Motorola Credit Corporation ("MCC") is a wholly-owned subsidiary of Motorola, Inc. No publicly held company other than Motorola, Inc. owns 10% or more of MCC's stock.

2. Respondent Nokia Corporation is a publicly held company. No publicly held company owns 10% or more of Nokia's stock.

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OPINIONS BELOW

In addition to those set forth in the Petition, the following unreported orders are relevant: the district court's order denying a stay of the preliminary injunction (Resp. App. 1a); the court of appeals' orders denying such a stay (Resp. App. 3a, 5a); the district court's opinion and order finding Defendants in contempt (Resp. App. 7a); and the district court's memorandum order directing Defendants to withdraw interfering Turkish injunction actions (Resp. App. 18a). The district court's memorandum order regarding stay pending appeal (Resp. App. 23a) is reported at 275 F. Supp. 2d 519.

STATUTES AND TREATY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-208 (2000), are set forth in the Appendix to the Petition (Pet. App. 296a-300a).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention") provides in relevant part:

Article II

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties

to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

PRELIMINARY STATEMENT

The Petition seeks to locate this case within claimed circuit conflicts that have no bearing here. This effort relies on three fundamental misconceptions. *First*, the Petition casts this case as a commercial loan dispute governed by contracts containing arbitration clauses. As the courts below recognized, however, this is a tort action, against individual tortfeasors, for fraud, conspiracy and extortion. The case in no way arises from the loan contracts invoked by the Uzans. *Second*, the Petition glosses over the incontrovertible fact at the center of this case: the Uzans have no agreement of any kind with the Respondents, much less an agreement in writing to arbitrate. The Uzans are not parties to the loan contracts they try to invoke. *Third*, the Petition focuses on arbitrability decisions in domestic cases, decided under Chapter 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (2000). This case, however, is an international dispute governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and Chapter 2 of the FAA, 9 U.S.C. §§ 201-208.

Viewed in light of these realities, Petitioners' asserted grounds for certiorari are illusory. Because the Uzans are not parties to the contracts, the district court found their appeal frivolous, and the court of appeals refused to grant a stay. The circuits agree that in these circumstances an appeal does not divest the district court's jurisdiction. The claimed circuit split invoked in the first question is not implicated here.

Similarly, Petitioners' asserted conflict on choice of law concerns the choice between American state and federal law in domestic cases decided under FAA Chapter 1. Because this is an *international* dispute, it is outside that circuit split. Under the Convention and Chapter 2, this international dispute is governed by the foreign law chosen by the parties.

There is an additional reason to deny certiorari. The Uzans have made clear, through their conduct and statements, that they do not recognize U.S. jurisdiction over them. They are now international fugitives who cannot be found for enforcement. This Court should decline to exercise its discretionary jurisdiction where those seeking review will obey the Court's judgment only if it favors them.

STATEMENT OF THE CASE

Motorola Credit Corporation ("MCC") and Nokia Corporation ("Nokia") sued five members and a close associate of the Uzan family, and three Uzan-owned companies, for frauds that began with the fraudulent inducement of billions of dollars in loans. The frauds also included diversion of assets, extortion, and theft of the collateral. Pet. App. 68a-71a, 282a-287a. The Uzans ultimately "carried their fraud into the court itself," through disobedience of court orders, "sham excuses, and false testimony." Pet. App. 287a; *id.* 98a, 216a. The Uzans were found liable for their own misconduct, in their individual capacities, and not for the debts or acts of the companies they used as instruments to commit their frauds. Pet. App. 3a-6a, 17a, 292a, *see also id.* 95a-97a, 288a-289a.

A. The Uzans

At the time of the loans, the Uzans were a prominent Turkish business family that owned more than 130 companies, including banks, construction companies, utilities, media outlets, and communications companies. Pet. App. 69a, 137a-142a. Though Turkish citizens, the Uzans had New York apartments, bank accounts, and driver's licenses, owned companies headquartered in New York, and had continuous contacts with New York. Pet. App. 120a-137a.

The Uzans ran their business empire as a single enterprise, disregarding corporate formalities, shifting assets, and commingling business and personal expenses. Pet. App. 145a-148a. In 2003, the Uzan business empire crumbled. After the

Turkish government discovered an unrelated $6 billion fraud at an Uzan-owned bank, it seized the Uzans' companies. Pet. App. 13a n.6. The family leaders, Hakan and Kemal Uzan, are now international fugitives, subject to arrest in Turkey and wanted by Interpol. Others are subject to arrest in England. Pet. App. 223a. All of the Uzans are subject to arrest in the United States for contempt of the district court's orders. Pet. App. 246a. The Uzans' lead trial counsel recently moved to withdraw, in part because those counsel have not heard from several of their clients since mid-2003.

B. The Uzans' Frauds and Defiance of Court Orders

From 1998 to 2000, the Uzans fraudulently induced MCC and Nokia to lend more than $2.7 billion to an Uzan-owned company, "Telsim," for construction and operation of Turkey's second-largest cellular telephone system. The loans were secured by a controlling bloc of Telsim shares. Pet. App. 69a-70a. The Uzans induced the loans with false representations concerning the "business practices and finances of Telsim, the value and security of the collateral, the uses to which prior loan proceeds had been put, the status of other financing for Telsim, the existence and value of offers to purchase part or all of Telsim, and the status of" such purchase negotiations. Pet. App. 4a-5a.

From the outset, "defendants sought to enrich themselves at plaintiffs' expense." Pet. App. 199a. The Uzans "saw plaintiffs' loans to Telsim as a great opportunity to funnel vast sums into their control and then divert them wherever they chose, whether to prop up other companies in their far-flung enterprise or to simply launder monies into their own pockets." *Id.* The Uzans siphoned at least $1.135 billion of the lent funds for their own purposes, including at least $296 million into their personal accounts. Pet. App. 199a-204a. The Uzans used these funds for personal items "including at least four yachts, seven luxury apartments in the Trump World Tower, two jet planes, one helicopter, personal credit

card bills, etc." Pet. App. 201a; *d.* 70a. The full extent of the embezzlement remains unknown, due to the Uzans' refusal to provide discovery. Pet. App. 70a, 199a-200a.

While embezzling the loan proceeds, the Uzans also stole the collateral. Through secret shareholder actions, the Uzans diluted and ultimately destroyed the Telsim shares escrowed to secure the loans. Pet. App. 5a, 205a-212a, 283a-287a. The Uzans also tried to extort repayment concessions by filing false criminal charges in Turkey, accusing Plaintiffs' executives of "making explicit and armed threats to kill" Uzan family members. Pet. App. 5a, 214a-216a, 285a-286a.

In January 2002, MCC and Nokia sued the Uzans, one of their confederates, and three Uzan-owned companies involved in the dilution of the collateral and diversion of loan proceeds. Plaintiffs asserted fraud and tort claims under Illinois law and federal statutes including RICO. Pet. App. 3a, 6a. Plaintiffs did not sue Telsim, nor did they sue on the loan contracts. *Id.* Indeed, Plaintiffs are arbitrating with Telsim on the loan contracts.[1] Plaintiffs sued the tortfeasors who defrauded them—the Uzans, who used Telsim and other companies they own as tools to defraud the Plaintiffs.[2] Pet. App. 17a, 97a, 288a-289a, 292a.

The Uzans' conduct during the litigation was marked by unprecedented dishonesty, and thorough defiance of every order against them. Their dishonesty included patently incredible in-court testimony, sham promises to obey orders, and incredible excuses for not doing so. Pet. App. 216a,

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[1] Nokia's financing agent, ABN-Amro, has been arbitrating with Telsim since before this lawsuit. Pet. 5. Defendants caused Telsim to initiate arbitration against MCC in February 2002, shortly after this suit was filed. Pet. App. 8a n.3. Despite repeated representations that they "consent" to arbitrating with Plaintiffs, the Uzans have never sought to join either arbitration.

[2] Plaintiffs did not sue the Uzans as company officers. Pet. 6. They sued the Uzans as individuals, for their own tortious acts. Pet. App. 97a.

287a; *see id.* 216a-228a; Resp. App. 10a n.2, 15a-16a, 27a-28a. The magistrate judge concluded the Uzans had been "lying to the Court since I got involved in this case," while Judge Rakoff noted that "the degree to which defendants have misled this Court is, frankly, unparalleled in this Court's experience." Resp. App. 27a n.1. The Uzans' defiance of orders included refusing to deposit the collateral with the court; obtaining *ex parte* Turkish injunctions purporting to prohibit deposit of the collateral; filing resolutions that destroyed the value of the collateral (one day after being ordered not to do so); refusing to provide discovery or appear for deposition; obtaining *ex parte* injunctions from Turkish courts purporting to enjoin this lawsuit, and defying orders to have those interfering injunctions withdrawn. Pet. App. 6a-9a, 115a, 216a-228a; Resp. App. 1a-2a, 8a-16a, 27a-30a.

The district court held the Uzans in contempt, and imposed fines small and large, but was unable to coerce obedience. Pet. App. 7a-8a & n.8, 117a-118a, 217a-220a; Resp. App. 17a, 30a. The Uzans repeatedly and falsely promised compliance, and offered sham excuses, until the district court concluded such excuses were beyond belief. Pet. App. 117a-118a, 216a, 287a; Resp. App. 27a-28a; C.A. App. 1761. Thereafter, they openly told the district court they would continue to resist its jurisdiction and would not obey its orders. Resp. App. 32a-33a. The Uzans remain in contempt of the district court's orders, including the order to deposit the collateral, and are subject to jail for their contempts. Pet. App. 246a. Their conduct led the district court to "the single and overwhelming inference that [the Uzans] never had any intention to fully and fairly litigate this matter, or to abide by the rule of law or to do anything but thumb their noses at the Courts of the United States." C.A. App. 1894.

C. The District Court Rejects Arbitration

The Uzans claimed the case was required to be arbitrated under Telsim's loan contracts. The Uzans were not parties to

those contracts, and disavowed any obligation under them. Pet. App. 8a, 15a-16a, 113a; C.A. App. 437, 629, 1156.

The Uzans sought arbitration under FAA Chapter 2, which implements the Convention. Pet. App. 15a. Article II(1) of the Convention requires each nation to recognize any "agreement in writing" providing for arbitration of disputes. Article II(2) defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." 21 U.S.T. at 2519 (emphasis added). Where such an agreement exists, Article II(3), implemented by 9 U.S.C. § 206, allows district courts to compel arbitration "in accordance with the agreement." § 206. The Uzans admitted they were not parties to the arbitration agreements. C.A. App. 418, 437, 1156. They sought arbitration only under U.S. or Swiss equitable principles. Pet. App. 16a, 22a, 271a.

When MCC and Nokia sought a preliminary injunction requiring the Uzans to deposit the collateral with the district court, the Uzans argued arbitrability in resistance. The district court ruled the loan contracts and their arbitration clauses were "a total irrelevancy" because MCC and Nokia were not suing on the loans, but instead were pursuing a fraud action against individual tortfeasors with whom they had no contract to arbitrate. Pet. App. 292a. The district court granted the preliminary injunction, and denied a stay pending appeal upon learning that the Uzans had violated the injunction the day after it was entered. Resp. App. 1a-2a, 9a, 11a; Pet. App. 115a. The Uzans moved the court of appeals for an emergency stay of the injunction, citing their arbitrability contention, but were twice denied. Resp. App. 4a, 6a.

The district court heard argument on the motion to compel arbitration.[3] The Uzans argued that even though they had no

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[3] The Uzans did not seek to stay litigation pending decision of their arbitration motion. Pet. App. 61a, Resp. App. 19a. Instead, they argued

agreement to arbitrate, under Swiss law (which governs Telsim's contracts) they could consent to arbitration, and equitably estop MCC and Nokia from refusing such consensual arbitration. After considering submissions from Swiss law experts, the district court denied the motion to compel, concluding "that Swiss law discourages, if not prohibits, the joinder of non-parties to an arbitration," and that while Defendants sought to "consent" arbitration, "such consent cannot be effected unilaterally, especially where, as here, it is being employed simply as a way of avoiding an otherwise valid proceeding in this Court." Pet. App. 271a.

D. Defendants Appeal the Denial of Arbitration, But Continue to Litigate in District Court

The Uzans appealed the denial of their arbitration motion. At that time, nine months into litigation, the Uzans for the first time asked the district court to stay further proceedings, pending appeal. Pet. App. 8a; Resp. App. 19a. The district court observed the Uzans' active litigation might well have waived any right to arbitrate. Nonetheless, it addressed and denied their stay motion on the merits. Pet. App. 264a; *see also* Pet. App. 62a n.4; Resp. App. 19a.

The district court ruled that Section 16 of the FAA had no application to the Uzans, who were not parties to the arbitration agreements. Pet. App. 265a. The court concluded that "for this reason alone the appeal is frivolous, and the [stay] motion must be denied." *Id.* In the alternative, the court ruled that it retained discretion to deny a stay "where the appeal is patently frivolous or taken for an obviously improper purpose." *Id.* The court found that "a stay would only serve to advance the very machinations for which defendants have

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that motion as part of an omnibus motion to dismiss on jurisdiction and on the merits. Pet. App. 61a, C.A. App. 670-72. In the meantime, Defendants actively sought discovery, receiving more than 96,000 pages of documents. Pet. App. 117a-118a.

been found in contempt of court." *Id.* The court further denied a discretionary stay. Pet. App. 265a-266a.

While their appeal was pending, the Uzans continued to litigate in the district court. They maintained counterclaims, issued subpoenas, filed motions to compel, and issued deposition requests. *See* Pet. App. 9a, 118a. These efforts followed statements that Defendants intended "to engage totally and move forward" with litigation. Pet. App. 62a, 117a. Despite these promises, Defendants defied repeated orders to produce documents and be deposed, Pet. App. 9a, 57a, 118a-119a, 219a-220a, and never took the promised steps to restore and deposit the collateral. Pet. App. 216a-218a. The court concluded the Uzans' many promises had been shams. Pet. App. 216a; Resp. App. 27a-28a.

E. With No Stay From the Court of Appeals, the District Court Conducts a Trial

After the district court denied a stay, the Uzans asked the court of appeals to stay all litigation. Though it stayed the mounting contempt fines for the Uzans' defiance of the preliminary injunction, Pet. App. 8a n.4, the appellate court declined to stay the district court proceedings. Pet. App. 45a, 63a. On the eve of trial, the Uzans reiterated their "emergency" stay request, but the Second Circuit again issued no stay. Pet. App. 63a. Before proceeding to trial, Judge Rakoff ascertained that the court of appeals was aware of the trial's imminence. He "justifiably relied on the Court of Appeals' failure to grant defendants' proposed stay in making [his] determination to proceed to trial." Pet. App. 64a n.5.

At that point, the Uzans announced that, in supposed obedience to *ex parte* Turkish injunctions they had obtained themselves, they would not attend trial. Resp. App. 32a; Pet. App. 64a, 119a. The district court had already ordered the Uzans to have those self-obtained injunctions withdrawn, because they were obtained solely to interfere with this lawsuit.

Resp. App. 22a; Pet. App. 8a-9a, 218a. The Uzans refused, "profess[ing]" their supposed right as Turkish citizens "to seek the assistance of the Turkish Courts . . . to oppose the jurisdiction of the Courts of the United States . . . ." Resp. App. 32a-33a. Shortly thereafter, the Uzans' injunctions were overturned by the Turkish Supreme Court of Appeals, which found the injunctions "totally lack[ed] authority," were "illegal," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." Resp. App. 26a.

Judge Rakoff conducted a bench trial, relying principally on evidence from the fully contested preliminary injunction hearing. Pet. App. 64a n.6, 119a; Resp. App. 26a. The court also accepted additional written testimony and exhibits, and examined four witnesses. Pet. App. 119a-120a.

F. The Court of Appeals Remands, But Defendants Do Not Seek to Reopen the Trial

On March 7, 2003, after the trial but before any decision or judgment, the court of appeals issued an opinion resolving the Uzans' earlier appeal from the preliminary injunction. Pet. App. 250a. That opinion also remanded the Uzans' purported interlocutory arbitration appeal, which had not yet been briefed. Pet. App. 251a, 263a. MCC and Nokia had moved to dismiss that appeal as unauthorized because the Uzans were not parties to any agreement to arbitrate. The appellate decision denied both the motion to dismiss and the Uzans' stay motion as moot. Pet. App. 263a.

In response to the remand, the district court invited the parties to brief "any issue whatsoever . . . any subject under the sun" that they wanted to raise. C.A. App. 1986; *see* Pet. App. 72a. Judge Rakoff specifically raised the "obvious" question of "whether there is any need to reopen the trial record." C.A. App. 1980. The Uzans briefed six different challenges to jurisdiction, standing, the merits, and their renewed motion to compel arbitration. Pet. App. 72a-73a. They obtained

dismissal of MCC's computer hacking claims. Pet. App. 79a-81a. The Uzans did not, however, ask to reopen the trial, introduce evidence, or conduct a new trial. *See id.* Nor did they contest, at trial or on appeal, any of the evidence that had been introduced, or any of the findings and conclusions based on that evidence. Pet. App. 15a. With no request to set the trial aside, the district court proceeded to consider the evidence and render a decision. Pet. App. 72a.

G. The District Court Judgment

On July 31, 2003 the district court issued a 173-page opinion, deciding all post-remand motions, and making findings and conclusions on the merits. Pet. App. 10a, 68a-247a.

The district court denied the Uzans' renewed motion to compel arbitration. The court noted it was undisputed that the Uzans had no agreement with either Plaintiff, Pet. App. 97a, and that Plaintiffs' claims against the Uzans were "light-years removed" from anything within Telsim's loan agreements. Pet. App. 95a. The court rejected the Uzans' equitable argument for arbitration, finding that: MCC and Nokia had "directly su[ed] the real culprits, the Uzans," for fraud; the Uzans, with unclean hands, were undeserving of equitable relief; and the Telsim loan agreements were governed by Swiss law, "which strictly enforces privity of contract and generally prohibits non-parties from seeking to invoke contractual terms on their behalf." Pet. App. 97a-98a.

The court held the Uzans liable on Plaintiffs' state law claims of fraud, civil conspiracy, and constructive trust. Pet. App. 11a, 235a-249a. It awarded compensatory and punitive damages, injunctive relief, and constructive trusts. Pet. App. 11a-12a, 241a-245a. The Uzans have not complied with the injunctive relief, and are now subject to arrest for contempt. Pet. App. 12a, 246a.

H. Defendants' Frustration of the Judgment

Throughout the litigation, the Uzans have stood in contempt rather than reveal assets or bring them within judicial reach. They never complied with the preliminary injunction to deposit the collateral, and are subject to arrest for contempt. Pet. App. 105a, 216a-218a, 246a. They defied the court's discovery orders, leaving the court unable to assess their wealth or the magnitude of their fraud. Pet. App. 70a, 118a-119a, 219a-220a; Resp. App. 31a. They refused to post any bond. Pet. App. 12a; Resp. App. 28a. In related English proceedings, the Uzans incurred jail sentences rather than disclose assets. Pet. App. 221a-228a. Cem Uzan and Aysegul Akay remain subject to such imprisonment orders.

Federal Rule of Civil Procedure 69(a) allows judgment creditors to obtain discovery in aid of execution. The Uzans have defied orders to provide such discovery. Their trial counsel recently stated that none of the Defendants (individual or corporate) would appear for post-judgment depositions. The Defendants announced more than once prior to judgment that they would "oppose all efforts to enforce any judgment." Resp. App. 33a; C.A. App. 1985-86. The court of appeals noted Defendants' pattern of diverting and concealing assets is designed to frustrate any judgment against them, creating a "dwindling prospect" of Plaintiffs' being able to enforce their judgment. Pet. App. 29a-30a.

I. Proceedings on Final Appeal

The Uzans appealed the final judgment. An appellate motions panel initially dismissed the Uzans' appeals under the fugitive disentitlement doctrine, which allows dismissal of appeals by parties whose flight prevents enforcement of the judgment. Pet. App. 53a-54a. The motions panel later vacated that order and referred the appeals to a merits panel. Pet. 49a-50a. MCC and Nokia renewed their disentitlement motion before the merits panel. Pet. App. 2a n.1.

Though it remanded some remedies determinations, the court of appeals unanimously affirmed the judgment in all respects presented here. Pet. App. 45a. The court denied Plaintiffs' disentitlement motion, noting that it had undisputed discretion to dismiss, but it declined to exercise that discretion. Pet. App. 47a-48a.

The court of appeals concluded "the parties did not agree to arbitrate," because the Uzans are not signatories to the agreements on which they rely. Pet. App. 16a. Addressing the Uzans' equitable estoppel argument, the court noted that 9 U.S.C. § 206, under which the Uzans moved, permits arbitration "in accordance with the agreement," which in this case is governed by Swiss law. Pet. App. 18a. Honoring the parties' choice of law, the court said, "is necessary to ensure uniform interpretation and enforcement of [the] agreement and to avoid forum shopping," especially in the transnational context governed by the Convention. Pet App. 19a.

After oral argument, the court of appeals ordered supplemental briefing and expert affidavits on Swiss law and choice of law. Pet. App. 19a. Based on those submissions, the court of appeals concluded "that under Swiss law, defendants, as nonsignatories to the agreements, *may not* invoke the arbitration clauses contained in those agreements." Pet. App. 20a. Even the Uzans' Swiss law expert could not say Swiss law allowed a nonsignatory to compel arbitration. Pet. App. 21a-22a. Addressing the Uzans' asserted "principle of good faith," the court of appeals noted that such a principle, even if operable, did not require arbitration where the "*defendants* repeatedly acted in bad faith." Pet. App. 22a.

The court of appeals also rejected the Uzans' contention that their purported interlocutory appeal divested the district court's jurisdiction to proceed to trial. Pet. App. 24a-25a. The court acknowledged a circuit split on the issue of whether a nonfrivolous appeal from a denial of arbitration divests the district court's jurisdiction. Pet. App. 25a. The court noted,

however, a key difference between this case and those finding divestiture: in the latter cases, the Seventh and Eleventh Circuits had "*granted a stay* of the district court proceedings pending appeal." *Id.* "*In no case* has a Court of Appeals granted the relief that [the Uzans] now seek—undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration." *Id.*

The court of appeals denied rehearing. No judge requested an en banc vote. Pet. App. 295a.

REASONS FOR DENYING THE PETITION

I. The Divestiture of Jurisdiction Issue Does Not Warrant This Court's Review

A. There Is No Conflict Where, As Here, the District Court Found the Appeal Frivolous and the Court of Appeals Issued No Stay

Defendants argue the circuits are split on whether a district court may proceed during a nonfrivolous interlocutory appeal. But there is no split among the circuits on the facts presented here, where the district court found the appeal frivolous and the court of appeals refused to issue a stay. As explained in the cases that the Uzans claim are in conflict with the result here, "[e]ither the court of appeals or the district court may declare that the appeal is frivolous, and if it is the district court may carry on with the case." *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997). "If the district court denies the motion to stay, then the appellant may file a motion to stay in [the court of appeals.]" *Blinco v. Green Tree Serv'g*, 366 F.3d 1249, 1253 (11th Cir. 2004). If the appellate court determines the appeal is non-frivolous, it should grant a stay. *Id.* If not, litigation may proceed.

That is exactly what happened here. The district court denied the Uzans' stay motion, finding that because they were

not parties to any agreement to arbitrate, their appeal was frivolous and they could not invoke FAA § 16. Pet. App. 265a. The Uzans turned to the court of appeals, twice asking on an emergency basis to stay the trial. The court of appeals declined to issue a stay. Pet. App. 45a, 63a-64a & n.5.[4] In these circumstances, the courts of appeals all agree that the district court may go forward during the appeal. *See Bradford-Scott*, 128 F.3d at 506; *Blinco*, 366 F.3d at 1252; *see also Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 & n.8 (9th Cir. 1990); *In re Salomon Inc. Shareholders Deriv. Lit.*, 68 F.3d 554, 556, 561 (2d Cir. 1995) (affirming district court decision to proceed to trial).

The D.C. Circuit does not disagree. The unpublished case the Uzans cite, *Bombardier Corp. v. Nat'l R.R. Pass. Corp.*, No. 02-7125, 2002 WL 31818924 (D.C. Cir. Dec. 12, 2002),[5] follows *Bradford-Scott*, and is conditioned on the appeal being non-frivolous. Furthermore, in the D.C. Circuit, as elsewhere, an interlocutory appeal under FAA § 16 is unavailable for litigants who are not parties to an agreement to arbitrate. *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 684 (D.C. Cir.

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[4] The Uzans rely on a statement in the *second* appeal decision that their arbitration appeal was not frivolous. Pet. App. 23a. That statement came two years after a stay was sought and refused. By that time, the appeal was no longer interlocutory, and a stay was no longer the issue. *See* Pet. App. 63a-64a. That appeal was from final judgment; the question was whether to undo the results of a completed trial. Pet. App. 25a. The questions of frivolousness and whether to grant a stay were squarely presented to the first panel, which remanded the interlocutory appeal without deciding it. That panel refused to grant a stay. Pet. App. 45a, 63a-64a. A different panel's later hindsight aside does not alter the fact that the court of appeals considered the Uzans' stay request at the time, and refused to disturb the district court's decision. Pet. App. 45a, 63a.

[5] Unpublished orders from the D.C. Circuit are not precedential. D.C. Cir. R. 28(c). The *Bombardier* appeal was later dismissed for lack of jurisdiction under FAA § 16. 330 F.3d 250, 253-54 (D.C. Cir. 2003).

2003). Where there is no right of appeal, there can be no divestiture of jurisdiction.

In *Bradford-Scott* and *Blinco*, the appellate courts *granted* a stay. *Bradford-Scott*, 128 F.3d at 507; *Blinco*, 366 F.3d at 1253; *see* Pet. App. 25a. In the cases supposedly in conflict, the courts of appeals *denied* a stay. *Salomon*, 68 F.3d at 557; *Britton*, 916 F.2d at 1412 n.8. Here, no stay was granted. Pet. App. 45a, 63a. Thus, the cases claimed to be in conflict can be reconciled based on this factual distinction. *See* Pet. App. 25a. Although *Bombardier* denied a stay as unnecessary because divestiture was automatic, its ruling was restricted to a nonfrivolous appeal. *Bombardier*, 2002 WL 31818924, at *1. Here, the district court found the appeal frivolous, Pet. App. 265a, and the court of appeals did not disturb that decision. Pet. 45a, 63a. "*In no case* has a Court of Appeals granted the relief that defendants now seek—undoing a trial because the district court [assertedly] lacked jurisdiction" at the time. Pet. App. 25a. This case is unique, and falls outside any circuit conflict concerning divestiture.

B. This Case Is a Poor Vehicle to Decide Whether the District Court Had Jurisdiction

Putting aside the Uzans' effort to recast this case to fit it into an inapplicable circuit conflict, this case would be a poor vehicle for review, because the Court could not reach the issue or grant relief on these facts. The Uzans want the judgment undone because they claim the district court lacked jurisdiction at the time of trial. But the district court undisputedly reacquired jurisdiction long before judgment. Thereafter, the Uzans never asked to reopen the trial or conduct a new one. They have waived such relief. Finally, the Uzans' question is premised on a nonfrivolous appeal under FAA § 16. That premise does not exist here, because the Uzans, who are not parties to any agreement to arbitrate, may not invoke § 16 to obtain an interlocutory appeal.

1. The District Court Undisputedly Had Jurisdiction When It Rendered Judgment

The Uzans challenge the district court's jurisdiction at the time of *trial*, while their interlocutory arbitration appeal was pending. But what is before the Court for review is the *judgment*. *See Chevron USA v. Nat'l Res. Def. Council*, 467 U.S. 837, 842 (1984) (Court reviews judgments, not opinions). It is undisputed that the Second Circuit had remanded the case and the district court therefore had jurisdiction when it rendered the judgment here. Pet. App. 64a n.6, 248a.

The Uzans argue only that the district court lost jurisdiction during their interlocutory appeal. But that appeal ended, and the case was remanded, on March 7, 2003. Pet. App. 9a-10a, 251a, 263a. The district court's jurisdiction, if it had ever been divested, was undisputedly restored by the remand. Thus, the court had jurisdiction when it rendered judgment on July 31, 2003. Pet. App. 64a n.6, 248a; *see Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700, 705 (1972) (jurisdiction judged at time of judgment).

2. The Defendants Waived Relief

Defendants have waived the relief they seek. After the remand, the district court asked "whether there is any need to reopen the trial record." C.A. App. 1980. The court then invited the parties to submit briefs on "any issue whatsoever . . . any subject under the sun" they wanted to raise. C.A. App. 1986. Despite this invitation, the Uzans never asked to reopen the trial record. They briefed challenges to jurisdiction, standing, the merits, and arbitration, and succeeded in dismissing four claims against them. Pet. App. 72a-73a, 79a-81a. But they never asked to re-do the trial. *Id.* Having passed up the opportunity in the district court, the Uzans have waived such relief.

The Uzans would not have attended trial in any event. At the time, they claimed to be obeying Turkish injunctions they

had obtained themselves, purporting to enjoin themselves from defending (and Plaintiffs from prosecuting) this lawsuit. Resp. App. 25a, 32a-33a; Pet. App. 64a; 119a.[6] This case thus does not clearly present the divestiture question, because the Uzans would have been absent anyway for their own reason.[7] To consider undoing the trial, where such relief was waived and Petitioners did not attend for a different reason, would waste this Court's resources.

3. The Premise of the Question, a Non-Frivolous Appeal Under FAA Section 16, Is Not Presented Here

Finally, the premise of the first question—"a non-frivolous appeal pursuant to 9 U.S.C. § 16(a)"—is not clearly presented here. The Uzans were not authorized to take an interlocutory appeal under § 16, because they were not parties to any agreement to arbitrate. Numerous courts of appeals have held that a litigant who is not a party to an agreement to arbitrate cannot invoke FAA § 16 to obtain an interlocutory appeal. *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 748 (2d Cir. 1991); *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 540-41 (5th Cir. 2001); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 529-30 (7th Cir. 1996); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 684-85 (D.C. Cir. 2003).

This preliminary question would need to be resolved before the Court could reach the question presented. The court of appeals never decided it. Plaintiffs moved to dismiss the Uzans' purported § 16 appeal, but the Second Circuit remanded the appeal before briefing, and denied the motion to dismiss

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[6] The Uzans' injunctions were soon overturned by the Turkish Supreme Court of Appeals, which ruled the injunctions "totally lack[ed] authority," were "illegal," "impossible and inappropriate," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." Resp. App. 26a.

[7] By the same token, granting the Uzans relief would only lead to the same result: a trial on remand they will not attend. The Uzans have made clear they will attend no trial.

as moot. Pet. App. 263a. This threshold issue determines whether Petitioners' appeal fell within FAA § 16 at all, and thus stands as an obstacle to reaching the question presented. By assuming the premise of their question, the Uzans are asking this Court to decide the effect of a § 16 interlocutory appeal when it is far from clear they had one.[8]

There is good reason to limit § 16 appeals to those who have an agreement to arbitrate. Interlocutory appeals are disruptive for trial courts, appellate courts, and parties, and are therefore generally prohibited. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 & n.7 (1988). The FAA creates an exception, and allows immediate appeals from denials of arbitration, to protect parties who have *agreed* to arbitrate. To extend an interlocutory appeal to *nonparties* to arbitration agreements, however, would invite abuse. Any defendant could then delay litigation by filing a motion to arbitrate, followed by an interlocutory appeal, whether or not he had an arbitration agreement. *See, e.g.*, *Britton*, 916 F.2d at 1412. Arbitration agreements are common enough that one will often be nearby, an inviting object for defendants who want to stall proceedings. The FAA, however, "does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement." *DSMC*, 349 F.3d at 683.[9]

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[8] The court of appeals' hindsight statement in the second appeal that the first appeal "was not frivolous" (Pet. App. 23a) did not address whether that appeal had been *authorized*. Because the court was considering a final merits appeal, it did not have before it Plaintiffs' motion to dismiss Defendants' interlocutory appeal, which was presented to but not decided by the earlier Second Circuit panel. Pet. App. 263a.

[9] Such abuse of "nearby" arbitration agreements is shown in the endorsement of the Petition by Respondents Antonio Luna Betancourt and the three corporate defendants. These Defendants, who also claim to be entitled to arbitrate under the Telsim loan contracts, have no agreements with MCC or Nokia. The corporate defendants are at most mere stock-

Restricting interlocutory appeals under § 16 to signatories has the virtue of creating a bright-line jurisdictional rule. *See DSMC*, 349 F.3d at 683. Allowing nonsignatories seeking arbitration under equitable theories to invoke the FAA for appeals and attendant stays would require courts to become enmeshed in the merits to determine jurisdictional issues—"an unattractive prospect." *Id.* at 684.

C. The Court of Appeals Decision Was Correct

The Second Circuit's decision not to disturb the trial result was correct. The courts of appeals agree that if the district court finds the appeal frivolous, it may move forward. A dissatisfied party may seek relief in the court of appeals. If that court finds the appeal nonfrivolous, it may issue a stay; otherwise, litigation should proceed. Section I.A, *supra*; *Blinco*, 366 F.3d at 1253. This mechanical process supplies a bright-line test for district courts to apply in deciding whether to go forward. *See DSMC*, 349 F.3d at 683-84.

This Court has approved a similar procedure in the immunity and Double Jeopardy contexts. Parties denied those protections are entitled to immediate appeals. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Abney v. United States*, 431 U.S. 651, 659-62 (1977). Nonetheless, stays are not automatic, because such a rule would be subject to abuse. *See Abney*, 431 U.S. at 662 n.8, 663. Instead, appellate courts have developed a rule of concurrent jurisdiction, whereby a district court may proceed to trial if it concludes the immunity or double jeopardy contention is frivolous. *See, e.g., United States v. Salerno*, 868 F.2d 524, 539 (2d Cir. 1989). A court

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holders in Telsim. Luna is an Uzan confederate who held no Telsim shares and no known Telsim position. Pet. App. 203a-208a. These persons have no involvement in claims between Telsim, MCC and Nokia. Instead, they participated in diverting the loan revenues and diluting Plaintiffs' collateral. That these Defendants claim to be able to invoke Telsim's arbitration clauses, and to demand that all proceedings stop during an interlocutory appeal, demonstrates the dangerous absurdity of Petitioners' arguments.

of-appeals that disagrees can grant a stay. *See, e.g., Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). This Court has approved the practice, which "enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings." *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996).

Here the district court found the arbitration appeal frivolous. Pet. App. 265a. The Uzans twice sought emergency relief from the appellate court, but that court refused to issue a stay. Pet. App. 45a, 63a-64a. (The court had already twice refused to stay the preliminary injunction, based on the same arbitrability arguments.) In going forward with trial, the district court relied on the appellate court's refusal to stay. Pet. App. 64a n.5. In these circumstances, the district court was correct to proceed, and the appellate court was correct not to discard the trial result. Pet. App. 25a. The Petition presents no compelling need for review.[10]

II. The Use of Foreign Law Chosen By the Parties, in an International Contract Governed by the Convention, Does Not Require This Court's Review

A. There Is No Circuit Split On the Effect of a Foreign Choice of Law Clause in an International Contract Governed by the Convention and Chapter 2 of the FAA

The Uzans' second question asks whether the arbitrability of a dispute involving an international contract covered by FAA Chapter 2 is governed by the foreign law chosen in the contract rather than American law. Not one of the cases set forth in the Petition, however, decided that question. Instead,

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[10] The Uzans' suggestion that review is important to head off an "acute" risk of forum shopping (Pet. 19) is far-fetched. It is facially implausible that parties would change fora based on a perceived likelihood of an appellate stay, *if* the district court were to deny arbitration, find the arbitration contention nonfrivolous, yet deny a stay pending appeal.

Petitioners' cases all concern domestic disputes involving contracts covered by FAA Chapter 1, not Chapter 2. None of their cases address a dispute like this one, concerning an international contract governed by the Convention, FAA Chapter 2, and foreign choice of law.

The distinction is important. Prior to 1970, all disputes about arbitrability were governed by what is now Chapter 1 of the FAA, 9 U.S.C. §§ 1-16. Enacted in 1925, the FAA was intended to place arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 473 (1989). In 1970, however, the United States joined the Convention, 21 U.S.T. 2517, 330 U.N.T.S.3, which was intended "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). International contracts to arbitrate involve "special considerations and policies significantly different from those found" in domestic agreements, including chiefly the need for uniformity and predictability of the law that will govern disputes. *Id.* at 515.

Chapter 2 of the FAA (9 U.S.C. §§ 201-208) implements the Convention. While domestic contracts "entirely between citizens of the United States" continue to be governed by Chapter 1, contracts involving persons from other countries are governed by the Convention and Chapter 2. § 202. Chapter 1 continues to apply only to the extent that it does not conflict with the Convention. § 208.

Although the Convention and the FAA assure enforcement of agreements to arbitrate, they do not confer a right to compel arbitration of any dispute at any time. *Volt Info.*, 489 U.S. at 474-75. Arbitration is a creature of contract, *AT&T Techs. v. Comm. Workers of Am.*, 475 U.S. 643, 748 (1986), and the FAA "does not require parties to arbitrate when they have not agreed to do so." *EEOC v. Waffle House*, 534 U.S. 279, 293 (2002). In particular, the Convention contains specific lan-

guage requiring the existence of an "agreement in writing," which must consist of "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Art. II(2).

The Petition entirely overlooks the Convention and Chapter 2. Instead, the Uzans ask this Court to resolve an asserted circuit split in cases decided exclusively under Chapter 1. Pet. 22, 24. Every one of those cases concerns a choice-of-law clause incorporating American state law, and decides whether that state law displaces a default rule under Chapter 1. They are all American disputes.[11] None of those cases is like this one, where the dispute is international, governed by the Convention and FAA Chapter 2, and the contract invokes foreign law. Moreover, in every case the Uzans cite, both parties had undisputedly signed an agreement in writing to arbitrate. None of those cases presents the situation here, where the parties had *no* agreement, of any kind, in writing or otherwise. Pet. App. 16a, 97a, 265a, 271a. The Petition cites no case, much less any conflict, concerning whether there was an "agreement in writing" to arbitrate under the Convention, or whether a nonsignatory could invoke someone else's contract to avail himself of an arbitration clause. Pet. 21-25.

The conflict urged by the Uzans involves an American federalism issue applicable only to domestic arbitrations:

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[11] *See Ekstrom v. Value Health*, 68 F.3d 1391, 1393 (D.C. Cir. 1995) (American parties, Connecticut law); *Security Ins. Co. v. TIG Ins. Co.*, 360 F.3d 322, 323, 324 (2d Cir. 2004) (American parties, California law), *cert. denied*, 125 S. Ct. 90 (2004); *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 288, (3d Cir. 2001) (American parties, Pennsylvania law); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 381-82 (4th Cir. 1998) (American parties, Maryland law); *Action Indus. v. USF&G*, 358 F.3d 337, 339, 341 n.13 (5th Cir. 2004) (American parties, Tennessee law); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 927-28 (6th Cir. 1998) (American parties, Ohio law); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1206, 1210 (9th Cir. 1998) (Hong Kong franchisee vs. American franchisor; federal and California claims; California law).

whether, and under what circumstances, a state arbitration rule can displace a federal one under FAA Chapter 1.[12] The Uzans argue that a federal "substantive law of arbitrability," arising from a body of this Court's decisions under FAA Chapter 1, supplies default rules of decision that trump conflicting state laws. Pet. 22, 23 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and progeny). That body of law preempts American state laws under the Supremacy Clause. *See Southland Corp. v. Keating*, 465 U.S. 1, 12-15 (1984). The Uzans ask this Court to resolve a claimed circuit split on whether to apply federal or state arbitrability rules, by reaffirming that federal rules presumptively apply, and trump state law chosen in general choice-of-law clauses. Pet. 22-24.[13]

That issue is not presented in this case or any international arbitration. The question here is whether the lower courts were correct to apply *Swiss* law to decide whether a *nonparty* to international contracts governed by Swiss law could invoke those contracts to compel arbitration under the Convention. Pet. App. 17a-19a. Swiss law, unlike American state law, is

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[12] *See Ekstrom*, 68 F.3d at 1393 (Connecticut limitations period for petitioning to vacate arbitral award); *Security Ins.*, 360 F.3d at 324 (whether California law applies to allow stay of arbitration); *Wolsey*, 144 F.3d at 1210 (same); *Roadway*, 257 F.3d at 291 (Pennsylvania standards for vacatur); *Porter Hayden*, 136 F.3d at 381, 382 (Maryland laches and limitations defenses); *Action Indus.* 358 F.3d at 341 (Tennessee vacatur standards); *Ferro*, 142 F.3d at 931-32 (Ohio law on whether fraudulent inducement claims are determined by court or arbitrator).

[13] The Uzans also imply that if federal law applies, they win, because the "court of appeals did not dispute" that agents of a company could invoke the company's contractual arbitration rights. Pet. 22 n.5 (citing *Campaniello Imports v. Saporiti Italia*, 117 F.3d 655, 668 (2d Cir. 1997)). On the contrary—Defendants' agency theory of arbitrability was *waived*, not conceded. The court of appeals "did not dispute" the theory only because it *did not consider it*, since it was not raised in the district court. Pet. App. 16a.

not preempted by American federal law of arbitrability. In the international context, the treaty governing arbitration (the Convention), and its implementing statute (FAA Chapter 2) are the supreme law of the land. U.S. Const. art. VI, cl. 2. The facts of this case do not present the question on which the circuit conflict is claimed.

B. The Court of Appeals Correctly Chose Swiss Law

There is also nothing in the Second Circuit's choice of law analysis that requires this Court's review. The Uzans moved to compel arbitration under 9 U.S.C. § 206, which authorizes a court to "direct that arbitration be held in accordance with the agreement . . . ." [14] The first task under § 206 is determining "whether the parties agreed to arbitrate." Pet. App. 16a. Because § 206 implements the Convention, the court had to determine whether there was an "agreement in writing" to arbitrate, as that term is defined in Article II(2)—*i.e.*, whether there was "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." *Id.*; *see Kahn Lucas Lancaster, Inc. v. Lark Int'l*, 186 F.3d 210, 215 (2d Cir. 1999). Here, the court only had to observe what is undisputed: the defendants "were not parties to any agreement to arbitrate with plaintiffs." Pet. App. 15a. There was certainly no "agreement in writing" that was "signed by the parties" within the meaning of the Convention. This conclusion alone is sufficient to uphold the judgment. *Kahn Lucas*, 186 F.3d at 215-218.

Moreover, Article II(3) of the Convention authorizes compulsion of arbitration only when "the parties" to the "action" (*i.e.*, the litigation) "have made an agreement within the meaning of this article." Courts applying the Convention, a treaty among sovereign nations, must construe it strictly, re-

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[14] Contrary to the Petition (at 7), the Uzans moved to compel only under Section 206, not Section 4, of the FAA. C.A. App. 677, 695-705.

fraining from adding to or altering its terms.[15] Thus, the district court could compel arbitration only if MCC, Nokia and the Uzans had a signed, written agreement to arbitrate. Art. II(2). They plainly did not. Pet. App. 15a, 16a.

The court of appeals went on to consider the district court's rationale: that Defendants could not invoke an agreement to which they were not parties, under the Swiss law governing the agreement. The court correctly noted that § 206 permits a court to order arbitration only "in accordance with the agreement." Pet. App. 18a. The agreement of course fundamentally includes its choice of law clause. The court concluded, fairly, that "if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements." Pet. App. 19a.

Defendants claim that honoring international choice of law clauses will threaten uniformity in the law, and encourage forum-shopping. Pet. 25. In the context of international agreements governed by treaty, these concerns are precisely backward. If the law of the forum governed these questions, then a litigant would have incentive to ignore contractually chosen law, and find a country whose forum law favored its view of arbitrability. *See Scherck*, 417 U.S. at 516-17. Parties would be frustrated in their ability to choose the law that governs their contract.

As the court of appeals explained, "applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have

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[15] *See, e.g., In re The Amiable Isabella*, 6 Wheat. (19 U.S.) 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions."); *Chan v. Korean Air Lines*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text—solemnly adopted by the governments of many separate nations . . . .").

signed the New York Convention." Pet. App. 19a. In the context of the Convention, this Court's admonition that courts not "insist on a parochial concept that all disputes must be resolved under our laws," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)), applies as much to arbitrability determinations as it does to substantive law. "Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA." Pet. App. 19a (quoting *Volt Info.*).

The court of appeals' ruling was fully consistent with this Court's decisions stressing the importance of choice of law clauses in international contracts. Choice of law clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherck*, 417 U.S. at 516; *see also Mitsubishi*, 473 U.S. at 629. Refusal to honor the parties' choice would disrupt predictability and invite forum shopping. *Scherck*, 417 U.S. at 516-17.

The Uzans' uniformity argument assumes the wrong frame of reference. They argue federal substantive law gives uniformity and predictability over foreign law. Pet. 25. But in the international context, to apply federal law would mean applying American law—one nation's common law, among the 134 nations that have signed the Convention. Such "parochial" application of forum law has been rightly rejected by this Court. While federal law may be convenient, American courts are up to the task of considering foreign law chosen by parties to international contracts. *See* Fed. R. Civ. P. 44.1. The lower courts did so here quite capably. Pet. App. 19a-22a, 98a-99a. Parties should not complain about having to provide evidence of foreign law (Pet. 25) where that law was chosen in the contract they try to invoke.

Finally, the Uzans now argue that Swiss arbitrators should have decided whether the parties had an agreement to arbi-

trate. Pet. 26. But Defendants told the court of appeals (correctly) that this was a question for the court. Pet. App. 23a n.11. There was no error, *Mitsubishi*, 473 U.S. at 626; *see also First Options v. Kaplan*, 514 U.S. 938, 944-47 (1995); but if there were, it would be invited.[16]

The courts below concluded that under Swiss law, nonparties may not invoke others' agreements to compel arbitration. Defendants' Swiss law expert did not contend otherwise. Pet. App. 19a-22a. This Court does not use certiorari to review lower court determinations of foreign law. Nothing in the court of appeals' analysis calls for this Court's review.

III. The Court Should Decline to Grant Review For Fugitives Who Will Not Obey the Judgment

This Court should also decline to exercise its discretionary certiorari jurisdiction because Petitioners do not recognize U.S. jurisdiction over them, and have refused to respond to the judgment. The Court should not grant review where its eventual decision would be effectively advisory, because the Uzans will obey it only if they win.

Under the doctrine of fugitive disentitlement, appellate courts, including this Court, may decline to hear appeals from parties whose flight beyond reach allows them to choose whether or not to obey the judgment. *E.g.*, *Degen v. United*

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[16] Defendants cite *China Minmetals Mat'ls Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003) for the proposition that arbitrators should determine arbitrability, under the principle of "competence-competence." Pet. 26. Although *China Minmetals* discussed that principle, its holding went the other way: under *First Options*, the U.S. court had to decide independently whether the parties had agreed to arbitrate. 334 F.3d at 287-89; *see also id.* at 281 (discussing Convention Art. II(2)).

Defendants' claim that Swiss law "specifies that arbitrators . . . must decide questions of arbitrability in the first instance" (Pet. 26) is simply wrong. The Swiss statute they cite, like American law, requires that the *court* first determine whether "the parties have concluded an arbitration agreement." Pet. App. 300a; *see* Pet. App. 23a n.11.

States, 517 U.S. 820, 824 (1996). A fugitive need not flee after judgment; he may constructively flee by refusing to return. *United States v. Barnette*, 129 F.3d 1179, 1184 (11th Cir. 1997); *see Degen*, 517 U.S. at 822, 823, 826. Such refusal to submit to the Court's justice "disentitles [fugitives] to call upon the resources of the Court for determination of [their] claims." *Degen*, 517 U.S. at 824. The principles animating the disentitlement doctrine are concern for enforceability of judgments, *id.*, and the fairness and efficiency of denying review to those who "will respond to a judgment only if it is favorable." *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 282 (2d Cir. 1997); Pet. App. 48a; *see also Pesin v. Rodriguez*, 244 F.3d 1250, 1253 (11th Cir. 2001); *Barnette*, 129 F.3d at 1183, 1985; *Goya Foods v. Unanue-Casal*, 275 F.3d 124, 129 (1st Cir. 2001).

The same principle—that the Court should not offer its processes to those who will not respect its judgment—even more strongly supports denying certiorari review. Certiorari review is purely discretionary. The Court need not apply disentitlement or any other doctrine to deny review.[17] It may simply consider the equities along with the other factors it considers in deciding whether to exercise its discretion.

Here, the Uzans have openly denied the authority of U.S. courts over them. Resp. App. 32a-33a. They have declared and demonstrated that they will frustrate any judgment against them. Resp. App. 33a; C.A. App. 1985-86[18]; Resp.

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[17] The court of appeals acknowledged its discretion to dismiss the Uzans' appeals, but chose not to do so. Pet. App. 48a. That court, however, was in a different position than this Court. Its jurisdiction is mandatory; it had to decide whether to dismiss an appeal as of right.

[18] Defendants' counsel told the district court: "Should this court ultimately enter judgment in this case, the defendants also intend to resist every way they can the foreign enforcement of those matters because they do not believe this court does have the kind of jurisdiction necessary to enter those judgments in an enforceable way." C.A. App. 1985-86.

App. 21a-24a; Statement of the Case Section H, *supra*. They have defied repeated orders, before and after judgment, to disclose, restore, or deposit assets, preferring to incur jail sentences rather than do anything that might aid enforcement. Pet. App. 29a-30a, 216a-228a, 245a-246a; Resp. App. 8a-16a, 27a-28a, 31a n.2. Now they seek this Court's review from hiding places abroad, where they may continue to decide for themselves whether to respond to the judgment. The longer they remain beyond reach, the more they are able to continue to conceal, launder, and dissipate yet-undiscovered assets. Pet. App. 29a-30a, 198a-204a.

This Court should not make its discretionary review available to such litigants. "Heads I win, tails you'll never find me" is not acceptable from those who invoke this Court's jurisdiction. *Cf. Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003). The Court should conserve its resources for cases where its judgment will be obeyed.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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Counsel for Respondent Motorola Credit Corporation

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 666 (JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

ORDER

JED S. RAKOFF, U.S.D.J.

By telephonic application at 2:00 p.m. today, the defendants moved under Rule 8, Fed. R. App. P., to stay until May 28, 2002 the provision of the Court's Order of May 9, 2002 requiring the deposit of the shares of stock of Telsim Mobil Telekomunikayson Hizmetleri A.S ("Telsim") held by defendant Standart Telekomunikayson Bilgisayar Hizmetleri A.S ("Standart") into this Court's registry by no later than May 24, 2002. The Court, after hearing argument, denied the application, finding that the defendants had not met any of the legal requirements for such a stay. *See Rodriguez v. Debuono*, 175 F.3d 227, 235 (2d Cir. 1999). While the Court might, nonetheless, have accommodated a short adjournment of the stock transfer if defendants were proceeding in good faith, plaintiffs' counsel brought to the Court's attention, and defendants' counsel did not dispute, that the defendants have recently attempted to certify with Turkish authorities the resolutions passed at the January 4, 2002 Telsim shareholder meeting, in apparent contempt of provisions 2, 3 and 4, of the

Court's Order of May 9, 2002 (provisions as to which no stay had been sought from the Court). Additionally, plaintiff's counsel informed the Court of information suggesting that the defendants continue to attempt to misuse the Turkish criminal process for extortionate ends. Accordingly, the defendants' application for a stay pursuant to Rule 8, Fed. R. App. P., is hereby denied in all respects.

So ORDERED.

/s/ JED S. RAKOFF
Jed S. Rakoff, U.S.D.J.

Dated: New York, New York
May 21, 2002

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 22, 2002]

No. 02 CV 0666 (JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

v.

KEMAL UZAN, *et al.*,

MOTION INFORMATION FORM

Motion for: EMERGENCY PARTIAL STAY OF PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

MOTION BY: (*Name, address and sel mo. Of law form and of attorney in charge of case*)

OPPOSING COUNSEL: (*Name, address and sel. Mo. Of law firm and attorney in charge of case*)

SEE ATTACHED PAPER

Has counsel of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Has service been affected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No

Requested return date: May 23, 2002

(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No

(See F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

B. by firm date/argument notice? ☐ Yes ☒ No

C. If yes, enter date: _____

If no, explain why not: Order requires mandatory injunction to be complied with by May 24, 2002

Will the parties agree to maintain the stautus quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Jed S. Rakoff, U.S.D.J.

Brief statement of the relief requested: Defendants' seek a Stay pending appeal of the mandatory aspects of the District Court's Orders of May 9 and 21, 2002 granting Plaintiff's Motion for a Preliminary Injunction.

/s/ Robert F. Serio
by: *(Signature of Attorney)*
Signed name must be printed beneath
Robert F. Serio
Date: May 22, 2002

_____
Appearing for: *(Name of Party)*
Kemal Uzan, et al.

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

Before: Hon. Dennis Jacobs, *Circuit Judge*

IT IS HEREBY ORDERED that the motion for an emergency stay be and it hereby is DENIED without prejudice to renewal before the motions panel sitting June 4, 2002. Nokia's motion to file a 14-page brief in opposition is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

Filed: May 24, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 22, 2002]

No. 02 CV 0666 (JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

v.

KEMAL UZAN, *et al.*,

MOTION INFORMATION FORM

Motion for: EMERGENCY PARTIAL STAY OF PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

MOTION BY: (*Name, address and sel mo. Of law form and of attorney in charge of case*)

OPPOSING COUNSEL: (*Name, address and sel. Mo. Of law firm and attorney in charge of case*)

SEE ATTACHED PAPER

Has counsel of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service beea affected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No

Requested return date: May 23, 2002
(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No
(See F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

B. by firm date/argument notice? ☐ Yes ☒ No

C. If yes, enter date: _____

If no, explain why not: Order requires mandatory injunction to be complied with by May 24, 2002

Will the parties agree to maintain the stautus quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Jed S. Rakoff, U.S.D.J.

Brief statement of the relief requested: Defendants' seek a Stay pending appeal of the mandatory aspects of the District Court's Orders of May 9 and 21, 2002 granting Plaintiff's Motion for a Preliminary Injunction.

/s/ Robert F. Serio
by: *(Signature of Attorney)*
Signed name must be printed beneath
Robert F. Serio
Date: May 22, 2002

_____
Appearing for: *(Name of Party)*
Kemal Uzan, et al.

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

Before: Hon. Amalya L. Kearse, Hon. Joseph M. McLaughlin, *Circuit Judges*, Hon. George B. Daniels*, *District Judge*.

IT IS HEREBY ORDERED that the motion for a stay pending appeal be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

Filed: June 5, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
S. D. NEW YORK

[Filed Aug. 22, 2002]

No. 02 CIV. 666(JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

Plaintiffs,

v.

KEMAL UZAN, *et al.*,

Defendants.

OPINION AND ORDER

RAKOFF, D.J.

Plaintiffs Motorola Credit Corporation ("Motorola") and Nokia Corporation ("Nokia") seek a finding of civil contempt against the nine defendants here, namely, five members of the Uzan family (Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, and Aysegul Akay), their associate Antonio Luna Betancourt, and three Uzan-controlled companies, namely, Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom"), Standart Pazarlama A.S. ("Standart"), and Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom"). Full familiarity with all prior proceedings in this case is here presumed.

The facts here pertinent are as follows. After a lengthy evidentiary hearing, the Court, by Order dated May 9, 2002 (the "May 9 Order"), granted plaintiffs certain preliminary

injunctive relief designed *inter alia* to prevent further dilution and diversion of certain stock held by defendant Standart Telekom in Telsim Mobil Telekomunikayson Hizmetleri A.S. ("Telsim"), another Uzan-owned and Uzan-controlled company.[1] This stock (hereinafter referred to as "the collateral"), consisting of 73.5% of Telsim's total stock, effectively represented plaintiffs' primary security for repayment of $2.7 billion in loans extended by plaintiffs to Telsim and thereafter seemingly diverted, in substantial part, to other Uzan-controlled entities. *See* May 21 Opinion at 12.

Among other things, the May 9 Order prohibited the defendants and their agents from taking any step, directly or indirectly, to "certificate, transfer, encumber, or affect in any way whatever" the collateral itself or its "value, status, and/or availability to this Court." Such a provision was necessary, among other reasons, because on January 4, 2002, certain of the defendants had caused Telsim to enact certain resolutions (the "January 4 Resolutions") that, if effective, would, by creating a new class of Uzan-controlled shares with authority to nominate four of Telsim's five directors and all three of Telsim's statutory auditors (as well as permitting Telsim to establish foundations or become a member in foundations), effectively strip the collateral of its voting, auditing, and management control rights. *See* May 21 Opinion at 16.

When, shortly after the January 4 Resolutions were promulgated, plaintiffs filed the instant lawsuit, defendant Murat Hakan Uzan, the chief executive of Telsim, sought to stave off injunctive relief by declaring that, since the January 4 Resolutions had never been registered or certified with the relevant Turkish authorities, they were "not now and never [have] been in effect." Declaration of Murat Hakan Uzan,

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[1] *See also* Order dated May 10, 2002 ("May 10 Order") continuing attachment of defendants' New York assets and Opinion dated May 21, 2002 ("May 21 Opinion") detailing findings supporting the May 9 and May 10 orders.

sworn to March 14, 2002, at ¶ 153. Mr. Hakan Uzan further declared, under penalty of perjury, that "[s]ince it appears to be an issue to which plaintiffs object . . . we will hold the resolution[s] in suspense." *Id.* Thus, when the Court issued its May 9 order prohibiting the defendants from, *inter alia*, affecting in any way whatever the status of the collateral, one would have thought that, if nothing else, no step would be taken by defendants to give effect to the January 4 Resolutions. *See* May 21 Opinion at 16, n. 4.

Yet, the very next day, May 10, 2002, Mr. Hakan Uzan, in defiance of the May 9 Order and in contravention of his own prior promise to the Court, caused Telsim to apply to the Turkish authorities for registration/certification of the January 4 Resolutions, while failing to disclose this step to this Court. The registration was ultimately accomplished on July 19, 2002. *See* Declaration of Jason Brown, sworn to July 30, 2002, Exhibit A (copy of the Turkish Commercial Gazette dated July 24, 2002 showing registration of Telsim's January 4 Resolutions by the Turkish Commercial Registry on July 19, 2002).

Nor is this all. The May 9 Order also required the defendants to deposit the collateral with the registry of this Court by no later than May 24, 2002. This relief, sought by plaintiffs from the outset of this case in order to safeguard the collateral from further tampering and thereby preserve the status quo, was a primary subject of a six-day evidentiary hearing held by this Court between April 9 and April 18, 2002 at which time the Court indicated its decision would be forthcoming shortly. But as soon as the hearing was over, three Telsim distributors, in seeming collusion with defendants (*see infra*), obtained in the Turkish courts emergency orders enjoining defendants from effecting any transfer of the collateral to this Court. Moreover, Mr. Hakan Uzan, though promptly informed of these orders, expressly directed his United States counsel not to disclose the existence of these

orders to the U.S. Courts. Further still, after this Court issued its May 9 Order directing transfer of the collateral to the registry of this Court, defendants not only made no meaningful effort to oppose the injunctions obtained by the Telsim distributors but also acquiesced in the issuance of still a fourth such injunction.

Against this background, plaintiffs ask the Court to hold the defendants in civil contempt for (i) seeking registration/certification of the January 4 Resolutions, and (ii) failing to transfer the collateral to the Court's registry. On June 21-24, 2002 the Court held an evidentiary hearing on the contempt motion, at which Mr. Hakan Uzan, having been guaranteed temporary "safe passage" by the Court for this purpose, testified.[2] Upon consideration of the evidence there adduced,

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[2] Much of Mr. Hakan Uzan's testimony—such as his assertion that he somehow "forgot" his prior promise to this Court not to seek registration/certification of the January 4 Resolutions, *see* transcript of evidentiary hearing ("tr.") at 17-18—is incredible on its face, and the Court so finds. The portion of his testimony that, in terms of his demeanor, appeared most sincere was his assertion that the two female defendants, his mother Melahat Uzan and his sister Aysegul Akay, were, despite their ownership interests in various Uzan-controlled business enterprises, effectively uninvolved in business decisions and, instead, simply followed the orders given by him, his brother Cem Cengiz Uzan, and their father Kemal Uzan. *See, e.g.*, tr. at 8-13; but other facts, discussed *infra*, cast doubt even on these assertions, especially as regards Ms. Akay. Even assuming Mr. Hakan Uzan's testimony is true in these respects, however, the agency role in which Melahat Uzan and Aysegul Akay have thereby placed themselves may still subject them to liability for civil contempt. *See infra*. As for Mr. Hakan Uzan's assertion that Uzan-related business decisions are not made at weekly family dinners, as prior witnesses had reported (*see* May 21 Opinion at 9), but are more diffuse, with Kemal, Cem, and Hakan taking individual responsibility for various Uzan-owned entities, *see, e.g.*, tr. at 301-03, this testimony even if credited, is largely irrelevant to the instant mater, or indeed, to any issue in this case since such division of responsibility does not absolve any of the individual Uzan defendants of joint and several liability for the actions of particular entities within the joint enterprise of Uzan entities that they own and control.

and taking account as well of the various other submissions of the parties, the Court reaches the following conclusions:

Unlike criminal contempt, civil contempt does not require showing of a willfully contemptuous purpose (although, as indicated below, the Court finds such purpose here). Rather, a movant seeking to hold a respondent in civil contempt must show, by clear and convincing evidence, that, in fact, the respondent has failed to comply with a clear and unambiguous order of the Court and that this failure is, at a minimum, the result of the respondent's failure to exercise due diligence to comply with the order. *See Drywall Tapers & Pointers of Greater N.Y. v. Local 530, Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 394 (2d Cir.1989); *Int'l Controls & Measurement Corp. v. Watsco, Inc.*, 853 F.Supp. 585, 587 (N.D.N.Y.1994).

As to the first specification of contempt, regarding the registration/certification of the January 4 Resolutions, it is beyond reasonable dispute that Mr. Hakan Uzan's decision on May 10, 2002 to ask the Turkish authorities for the registration/certification (subsequently granted) that, by his own admission, was necessary to give the Resolutions legal effect was a clear violation of the provision of the May 9 Order prohibiting him and his co-defendants from taking "any other step" that could, directly or indirectly, "affect in any way whatever" the status of the collateral. As previously noted, the Court does not credit Mr. Hakan Uzan's testimony that he somehow "forgot" his prior sworn promise to this Court not to seek to certify the January 4 Resolutions, tr. at 15-16; but even if this were true, it would still evidence a lack of reasonable diligence on his part. As for his claim that the registration/certification was necessary to meet certain upcoming deadlines under Turkish law, *see* tr. at 15, 146, both the imminence of the alleged deadlines and the necessity of meeting them is directly refuted by the only testimony of a Turkish legal expert directly on point, *see* Declaration of

Dr. Fadlullah Cerrahoglu, sworn to June 6, 2002 (Exhibit 6 to the Declaration of John O'Connor, sworn to June 5, 2002) at ¶ 27. Moreover, even if there were applicable deadlines, a defendant exercising reasonable diligence would have brought them to this Court's attention and sought modification of the May 9 Order, rather than, as happened here, surreptitiously flouting the order the day after it was issued. In short, the proof of Mr. Hakan Uzan's contempt with respect to the first specification is overwhelming.

As for the other defendants, all the Uzans were material beneficiaries of the January 4 Resolutions, several were members of the board that approved the Resolutions, and all but Melahat Uzan, the Court finds, were in a position to prevent registration/certification of the Resolutions if they had exercised reasonable diligence. While Hakan Uzan may claim that his sister, Aysegul Akay, despite her liberal education, blindly followed his orders on matters of business, *see supra*, the fact remains that she not only served on various boards of Uzan-controlled entities, including Telsim, *see* tr. at 304, but also owned no less than 20% of Standart Telekom, which, as the holder of legal title to the collateral, was in a position to veto the proposed diminishment in the power of its shares. *See* Plaintiffs' Contempt Hearing Exs. C-144, C-145; *see also* tr. at 148-149.

As for Melahat Uzan, assuming *arguendo* the accuracy of Mr. Hakan Uzan's testimony that, so far as business is concerned, she is entirely the pawn of male members of the family, the fact remains that she permits these members to put relevant stock ownership in her name, thus enabling them to carry out their various business plans more effectively. It follows that she is liable for contempt, in her agency capacity, when, as here, those business plans entail contempt of this Court's orders.

Finally, as to the three corporate defendants, while their roles in helping control the collateral and its disposition have

already been described by the Court in its May 21 Opinion, their relationship to the specific conduct of attempting to register/certify the January 4 Resolutions is more problematic and has not been proven to a standard of clear and convincing evidence. Consequently they will not be held in contempt as to this specification.

As to the second specification of contempt, regarding the failure to deposit the collateral in the registry of this Court, there is no dispute that the order was clear and the non-compliance plain. *See* tr. at 28-29. Nor can it be seriously maintained that the defendants have been reasonably diligent in complying with the Court's order. Standart Telecom, which holds legal title to the shares, has done nothing to effectuate the transfer, nor have the Uzans, who control all the relevant entities (Telsim, Standart, Standart Telehom, Unikom, Rumeli Telefon Sistemleri A.S., etc). Indeed, Mr. Hakan Uzan repeatedly testified at the contempt hearing that he has not yet decided whether or not to comply with the order to transfer the collateral to the registry of this Court *even if* the Turkish injunctions prohibiting such transfer are lifted. Tr. at 48-49, 256-57.

To be sure, since the Turkish injunctions remain in effect at present, the defendants contend that, regardless of their intent, their non-compliance with the provision of the May 9 Order requiring transfer of collateral to this Court's registry is excused because, even before the Order took effect, three distributors of goods and services to Telsim obtained preliminary injunctive orders from three Turkish courts barring transfer of any Telsim shares outside of Turkey. *See* Declaration of Murat Hakan Uzan, sworn to June 3, 2002, Exs. A, B, C (Turkish orders). (As noted above, defendants have also notified the Court that a fourth injunction has now issued, although its details are rather sketchy. *See* Defendants' letter to the Court dated July 10, 2002.)

The merits or demerits of these Turkish orders are no business of this Court. They provide, however, no justification for the defendants' noncompliance with the May 9 Order because, on inspection, it is apparent that they are in substantial measure the product of collusion between the plaintiff-distributors and the defendants here and that, in any case, the defendants, if they wished, could readily resolve any dispute with their distributors that might conceivably justify such relief.

To begin with, one must ask why any Telsim distributor would have such a strong interest in preventing the transfer of Telsim's stock to a U.S. Court's registry as to seek an *ex parte* injunction to prevent it. Indeed, it is hard to see that the distributors have any interest aside from being paid for the services and goods they provide.

Moreover, the timing of the suits, two of which were filed immediately following the conclusion of this Court's preliminary injunction hearing but before the Court had given its ruling, is highly suspicious. Although filed by separate counsel, the suits closely copy one another, with large portions of the wording of the respective complaints being nearly identical in all three complaints and all three seeking the identical, and unusual, relief. It further turns out that one of the complaints was brought by a company controlled by a Uzan family cousin, tr. at 34, and all three complainants do business virtually exclusively with Telsim. Tr. at 58.

Even more telling has been the defendants' response to the lawsuits. Although Mr. Hakan Uzan testified before this Court that he had no role in bringing these suits and that, once informed of them, he directed his attorneys to do all in their power to get the Turkish courts to lift these injunctions, tr. at 39, 208, 216-17, this testimony is belied by the record. Telsim's opposition papers to the injunctions (Plaintiffs' Contempt Hearing Exs. C-13, C-14, C-15) are worse than tepid: they virtually concede, and in some respects effectively

support, the arguments of the three plaintiffs. Thus, in alleged "opposition" to the injunctions, each of the (virtually identical) papers submitted by Telsim to the Turkish courts states:

> "[w]hile it is true that the plaintiff's relationship with Telsim constitutes its whole business, its damages would be very minor compared to the damages to be incurred by Telsim, its shareholders and other distributors and dealers if, as a result of the delivery of Telsim shares to abroad [sic], the license agreement, providing concessions, by and between the Ministry of Transportation and Telsim is cancelled."

See id. at ¶ 2. Collusion quite aside, no one can seriously contend that such "opposition" fulfills the obligation of the Uzan defendants who control Telsim to exercise reasonable diligence to comply with this Court's May 9 Order.

Nor is there any meaningful evidence that defendants' more recent "attempts" to lift the injunctions, *see* Defendants' letter to the Court dated July 10, 2002, have been anything other than tepid window-dressing. Whether or not the lawsuits are collusive, the defendants could readily arrange for their dismissal by coming to terms with their suppliers as to any claims the suppliers might have—a matter of simple economics that would in no way involve the Turkish courts. Defendants' failure to do so is further evidence of their failure to exercise reasonable diligence to comply with this Court's orders.

Most telling of all, perhaps, is the fact that the defendants, though fully aware of the Turkish injunctions well before the Court issued its May 9 Order, purposely kept them secret from the Court—going so far as to instruct their U.S. counsel not to reveal them to this Court or to the Court of Appeals judge who heard defendants' initial request for a stay of the

May 9 Order.[3] Whatever lame excuses defendants may now offer for this materially misleading conduct, the real reason, the Court finds, was to conceal as long as possible their involvement in these collusive suits and their intent to use them, if all else failed, to subvert the orders of this Court and of the Court of Appeals.

While most of the defendants did not play the obstructionist and deceptive role essayed by Mr. Hakan Uzan, all were in a position, to a greater or lesser extent, to assist in the steps necessary or helpful to transfer the collateral to this Court's registry, and none did. Accordingly, all will be found in civil contempt with respect to this specification.

In short, all the defendants are held in civil contempt for failing to deposit the collateral with the Court, and all but the corporate defendants are separately held in contempt in connection with the registration/certification of the January 4 Resolutions. This being civil contempt, the defendants can purge their respective contempts by causing the January 4 Resolutions to be decertified or rescinded and by causing the collateral to be transferred to the registry of this Court. However, given the Court's prior findings of the interdependent relationships among the defendants, *see* May 21 Opinion at 9-10, no single defendant can purge that defendant's contempt unless all of the defendants purge theirs, except that, since the corporate defendants are not implicated in the first specification, delivery of the collateral to the Court's registry will itself purge the corporate defendants' contempt.

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[3] Closing arguments at the preliminary injunction hearing were completed on April 18, 2002. The first Turkish injunction was entered on April 19, and U.S. counsel learned of them in late April or early May. *See, e.g.*, tr. at 30-32, 248. Nonetheless, the earliest that anyone brought these injunctions to the attention of any U.S. court was in a May 28, 2002 telephonic conference, well after the issuance of the May 9 Order and after the Court of Appeals had denied a stay of that Order.

Since the size of the penalty necessary to compel such compliance is uncertain, it is necessary to start small but impose a sliding scale. Specifically, until their contempts are purged, the defendants will be liable for a monthly fine, payable to the Clerk of the Court on the last day of each month, beginning at $1,000 for the month of June, 2002 (the first full month of contempt) and doubling each month thereafter (*i.e.*, $2,000 for July, $4,000 for August, etc) until either the contempts are purged, or the total amount owed (which is presently $3,000, *i.e.*, $1,000 for June and $2,000 for July) exceeds the estimated value of the collateral prior to passage of the January 4 Resolutions (approximately $1.5 billion), at which point (if not sooner) additional coercive measures may need to be considered. In addition, defendants are hereby held liable, jointly and severally, for plaintiffs' costs and reasonable attorneys fees in prosecuting this contempt motion. Plaintiffs should submit an accounting thereof within 10 business days hereof, after which defendants will have 10 business days to file any objections.

Plaintiffs claim that defendants are hell-bent on never transferring the collateral to this Court, not to mention never rescinding the January 4 Resolutions. Defendants, by contrast, claim that they are law abiding business persons, stymied in fulfilling their obligations only by legal and economic developments beyond their control. If the latter is true, they will not hesitate to purge their contempts promptly, at little cost to themselves. But even if the former is true, the Court is hopeful that the price of noncompliance will eventually bring them to their senses.

APPENDIX E

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Jan. 7, 2003]

No. 02 Civ. 666(JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

MEMORANDUM ORDER

RAKOFF, J.

Pursuant to Rule 65, Fed.R.Civ.P., and also to the All Writs Act, plaintiffs Motorola Credit Corporation and Nokia Corporation move to enjoin the defendants and those acting in concert with them from proceeding with a newly-filed Turkish injunction action and a previously-filed Turkish attachment action. Full familiarity with all prior proceedings in this case is here presumed.

The facts pertinent to the instant motion are as follows. Following the initiation of this suit in New York, Telsim Telekominkasyon Hizmetleri Anonim Sirketi ("Telsim") and Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon"), which are non-parties to the lawsuit but controlled by the defendants here, filed (between them) demands for three arbitrations in Switzerland and one in France that with the exception of the latter threatened to interfere with this litigation. In connection

with one of the Swiss demands, Telsim obtained an order from the Turkish Civil Court of First Instance for the District of Kucukcekmece attaching the property of Motorola Komunikasyon Ticaret ve Servis Ltd. Sti. ("Motorola Turkey") and Motorola Ltd., both of which are affiliates of plaintiff Motorola Credit Corporation. *See* Declaration of Allison G. Kort, dated December 10, 2002, Exhibit 1, at 6.

Thereafter, following considerable delay, defendants in this action belatedly moved in this Court to compel arbitration, and plaintiffs cross-moved to enjoin defendants and those acting in concert with them (such as Telsim and Rumeli Telfon) from pursuing the arbitrations. The Court, by Orders dated September 30, 2002 and October 15, 2002, denied defendants' motion and granted plaintiffs' motion (except as to the French arbitration), finding, *inter alia*, that the Swiss arbitrations had been "commenced in an effort to undercut the prior orders of, and proceedings before, this Court." Memorandum Order, dated October 15, 2002, at 7.

At no time prior to the issuance of these orders did the defendants seek to stay this lawsuit, or any ancillary proceedings, pending issuance of the Court's decision on the arbitration issue and any appeal therefrom. Nevertheless, on October 21, 2002, over nine months after the initiation of the suit, defendants filed a motion to stay the entire lawsuit pending their appeal of the Court's September 30 and October 15 Orders. While recognizing that defendants may well have waived any right to the relief they so belatedly sought, the Court, by Order dated October 28, 2002, denied defendants' stay motion on the merits, concluding that "a stay would only serve to advance the very machinations for which defendants [had] previously been found in contempt of court." Memorandum Order, dated October 28, 2002, at 2.

Unable to secure their desired relief in this Court, the defendants and their proxies returned to the court in Kucukcekmece. On November 27, 2002, in plain contravention of

this Court's September 30 and October 15 Orders, the individual Uzan defendants (Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, Aysegul Akay, and Antonio Luna Betancourt) and the defendant-controlled company Telsim, filed an *ex parte* petition in the Turkish Civil Court of Kucukcekmece against plaintiffs and Motorola, Inc. seeking to stay the instant action, and to vacate the injunction and attachment decisions issued in connection thereto, as well as to stay the ancillary proceedings in England, Germany, France, Bermuda, and Channel Island Guernsey. *See* Affidavit of Samir Varma, dated December 20, 2002, Exhibit A (Civil Court of Kucukcekmece, Turkey, preliminary injunction Order, dated November 27, 2002). In response, the Turkish Court, that very day, issued an order granting the relief requested.[1]

Plaintiffs now seek an order from this Court enjoining defendants from further pursuing this Turkish action and, instead, requiring them to terminate the action and dissolve the earlier-issued attachment. While "it is well-settled that a federal court has the power to enjoin a party before it from pursuing litigation before a foreign tribunal," *U.S. v. Davis*, 767 F.2d 1025, 1038 (2d Cir.1985), considerations of comity counsel that such injunctions be "used sparingly." *Id.* As a preliminary matter, two threshold requirements for issuance of such an anti-foreign suit injunction must be met, to wit (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined. *See China Trade &*

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[1] The order issued by the Turkish Court purports on its face to enjoin, not the plaintiffs, but this Court itself (as well as various foreign courts), a power no foreign court possesses. This Court can only assume that something has been lost in translation and that the Turkish Court in fact meant to enjoin the plaintiffs from prosecuting these actions, as whatever the jurisdiction of the Turkish court over Motorola Credit Corporation, Motorola, Inc, and Nokia Corporation, the Turkish court has no jurisdiction over the courts of foreign sovereigns.

Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir.1987).

Here, both these threshold requirements are satisfied. With regard to the Turkish injunction action filed on November 27, 2002, although Telsim and Motorola, Inc. are parties to the Turkish, but not to the U.S. action, and although Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom"), Standart Pazarlama A.S. ("Standart P."), and Standart Telekomunkikasyon Bilgisayar Hizmetleri A.S. ("Standart T.") are parties to the U.S., but not to the Turkish, action, the real parties in interest are the same in both matters. Indeed, the Court has previously found that Telsim is owned and controlled by, and is in the respects here relevant a mere proxy for, defendants. *See also Nagoya Venture Ltd. v. Souza*, 1998 U.S. Dist. Lexis 8580, at *19 (S.D.N.Y. June 11, 1998). As to Motorola, Inc., Unikom, Standart P. and Standart T., these entities were not necessary to the Turkish action, since the purpose of the action was to stay suits brought by Motorola Credit Corporation and Nokia Corporation (not Motorola, Inc.), and the individual Uzan defendants and Telsim obtained this relief despite the non-joinder of the other corporate entities. *See MasterCard Int'l, Inc. v. Argencard Sociedad Anonima*, 2002 U.S. Dist. Lexis 4625, at *30-31 (S.D.N.Y. March 20, 2002) (holding that the identity of party requirement was satisfied despite the intervention of an additional party in the foreign proceeding since this party was not a necessary party to the action). In addition, the only issue to be decided by the Turkish court is whether this and other actions should be dismissed in favor of arbitration, a question that this Court has already resolved in plaintiffs' favor. *See China Trade*, 837 F.2d at 35.

With regard to the Turkish attachment action filed on June 19, 2002, the relevant parties are Telsim, a proxy for defendants in all respects here relevant, as well as Motorola Turkey and Motorola, Ltd., affiliates of plaintiff Motorola

Credit Corporation. Again, the sole question before the Turkish court in the attachment action concerns the propriety of the Swiss arbitration, a matter that this Court has now resolved.

Once the threshold requirements are met, the issue becomes one of informed discretion. Here, the Court finds that with regard to both Turkish suits numerous supplemental factors support the issuance of an anti-foreign suit injunction against the defendants: (1) the Turkish actions threaten this Court's jurisdiction (indeed, the Turkish injunction suit has purported to stay proceedings in, and to nullify preliminary orders issued by, this Court); (2) the Turkish actions frustrate the United States' stated interest in prosecution of civil RICO claims; and (3) the Turkish actions were initiated by defendants in contravention of and in a tactical effort to evade the prior orders of this Court. *See id.* at 36-37; *Mastercard Int'l*, 2002 U.S. Dist Lexis 4625, at * 31-32. These factors more than overbalance any countervailing considerations of comity or otherwise.

Accordingly, the Court pursuant to Rule 65, Fed.R.Civ.P.,[2] hereby directs defendants, their proxies, and all others in concert with them, to take all steps necessary to withdraw and cause to be dissolved the Turkish injunction granted on November 27, 2002 and the action on which it is premised, and enjoins defendants from initiating any similar proceeding; and further, bars them from effectuating the attachment entered on June 19, 2002 against Motorola Turkey and Motorola Ltd. in connection with the Swiss arbitration and, instead, requires them to seek its immediate dissolution.

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[2] Finding that the Court's power pursuant to Rule 65 is sufficient to grant the requested relief, the Court need not reach the question of whether the remedy could also issue under the All Writs Act, 28 U.S.C. § 1651.

APPENDIX F

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Aug. 8, 2003]

No. 02 CIV. 666(JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

MEMORANDUM ORDER

RAKOFF, District Judge.

Defendants move under Rules 62(c) and 62(d), Fed. R.Civ.P., *either* for a stay pending appeal of execution of the judgment entered August 1, 2003 pursuant to the Order and Opinion dated July 31, 2003 (the "July 31 Order"), full familiarity with which is here presumed; *or*, failing that, for a temporary stay until the Court of Appeals "has had a fair opportunity" to consider a comparable motion under Rule 8, Fed. R.App. P. *See* Notice of Motion, dated August 5, 2003, at 1.

As defendants note, a court, in determining whether a stay pending appeal is appropriate, must first consider "whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . . " *Hilton v. Braunskill*, 481 U.S. 770, 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). *See* Defendants' Memorandum of Law In Support Of Defendants' Motion For Stay ("Def.Mem.") at 2. Yet while recognizing this high standard, defendants, in their motion papers, do little

more than recite in conclusory fashion numerous points on which the Court has ruled against them, apparently in the belief that quantity can substitute for quality. Mere conclusions, however, whether applied to one issue or many, do not constitute any kind of showing, let alone the requisite "strong showing." Accordingly, defendants have not even met the first requirement of a stay pending appeal.

Nonetheless, in recognition of the substantial relief embodied in the Court's judgment, a few words may be said about each of the seven issues that defendants asserts were "errors affecting the final judgment . . . . " Def. Mem. at 3.

(1) "Denial of Arbitration Rights" (Def. Mem. at 3-4). Defendants allege that the Court erred in denying defendants' motion to compel arbitration because the Court "mistakenly distinguished" relevant Second Circuit precedent, Def. Mem. at 4; but they fail to specify in what respects the distinctions were mistaken. There is no doubt that the arbitration issue was one of the more difficult issues confronting the Court, but the Court's analysis of that issue was fundamentally premised on the bedrock principle, repeatedly endorsed not only by the Second Circuit but also by the Supreme Court, that arbitrability is ultimately a matter of contract, that is, of who agreed to what. As explained in the July 31 Order at 28-35, the parties here never agreed to anything; the defendants here have no equitable standing to try to take advantage of what the plaintiffs agreed to with non-party Telsim; and, in any event, what the plaintiffs agreed to with Telsim does not extend to the instant dispute, especially in the case of plaintiff Motorola Credit Corporation ("MCC"). Defendants' instant papers address none of this.

It remains only to add that even if one were to assume for the sake of argument that the case should have been referred to arbitration, this would not warrant a stay of the injunctive relief embodied in the judgment, since such relief would still be authorized "in aid of arbitration." *See* July 31 Order at 36.

(2) "Inappropriate Exercise Of Supplemental Jurisdiction" (Def. Mem. at 4-5). While the defendants assert that "this Court never had original jurisdiction over Plaintiffs' RICO claims" (Def. Mem. at 4), they give no ground whatever for their conclusory assertion (Def. Mem. at 4) that this is because the instant case is "[u]nlike the situation" in *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir.2003), on which the Court relied. *See* July 31 Order at 15. In the Court's view, *Lerner* is not only directly apposite but also reflects underlying Supreme Court precedent. Moreover, implicit in the Court of Appeals' earlier decision in the present case is a recognition that the District Court had original jurisdiction over the RICO claims, since the Court of Appeals, despite dismissing those claims, remanded to this Court with direction that it determine whether to exercise supplemental jurisdiction "pursuant to 28 U.S.C. § 1367(c)," *Motorola Credit Corporation v. Uzan*, 322 F.3d 130, 137 (2d Cir.2003), a section that would not be applicable if there had not been original jurisdiction. In short, on this issue defendants' position appears to this Court to be wholly without merit.

(3) "Conduct of Improper 'Trial' "(Def. Mem. at 5). Defendants claim that the trial of this case occurred after the Court "was divested by the Federal Arbitration Act of jurisdiction to proceed"; that, in any event, the trial focused on the RICO claims that were later held to be unripe; and, finally, that the defendants were barred from participating by one or more Turkish injunctions. Def. Mem. at 5.

The first argument is simply a reiteration of defendants' point (1), *supra*, that the case should have been referred to arbitration. Listing it here as a separate point gives it no greater or lesser weight.

The second argument (that the trial focused on the RICO claims) has no validity whatever, since at all times the trial was a trial of all claims, each of which had to be analyzed separately. Moreover, virtually all the proof relevant to the

RICO claims was also relevant to the claims of fraud and civil conspiracy.

Finally, the third argument (that the defendants were barred from participating in the trial by Turkish injunctions)—besides being largely a rehash of the separate argument defendants make in their point (4), *infra*, that the Court failed to respect foreign law—is here a complete irrelevancy, because (a) the defendants never moved to suspend the trial on this basis; (b) the injunctions here referred to were procured by the defendants themselves in violation of this Court's prior orders, *see* July 31 Order at 27; Memorandum Order, dated January 6, 2003, at 3; (c) the injunctions in question actually purported to enjoin this Court itself from proceeding with this case and thus were void on their face; and (d) the injunctions in question were overturned by the Turkish Supreme Court of Appeals on February 25, 2003, with that court noting that the issuing court's actions were "totally lack[ing in] authority," "illegal," "impossible and inappropriate," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." *See* translation of the decision, Exhibit 2 to Declaration of Gordon M. Clay, annexed to Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion For Stay Without Bond ("Pl.Mem."). Additionally, it should be noted that, in fashioning a trial in these circumstances, the Court, *sua sponte*, afforded the absentee defendants further protection by relying heavily on the evidence adduced at the earlier six-day preliminary injunction hearing and two-day contempt hearing, at both of which defendants appeared and fully contested what, from a factual standpoint, were the same issues raised at trial.

(4) "Failure to Respect Foreign Law" (Def. Mem. at 5-6). Defendants' next assignment of error is the Court's alleged failure to defer to various other Turkish injunctions, especially the "multiple injunctions . . . issued by Turkish courts enjoining Defendants from transferring shares of Telsim stock." (Def. Mem. at 6). While the sordid history of the

defendants' collusive procurement of these injunctions has been largely described in prior rulings of this Court, it may be well to revisit a few of the low points.

After initially ordering defendants to transfer the Telsim collateral to the registry of this Court, the Court suspended that requirement pending a full evidentiary hearing on the requested preliminary injunction. *See* Memorandum Order, dated February 14, 2002. Following several days of testimony, with witnesses called by both sides, that hearing concluded on April 18, 2002, at which time the Court reserved decision. On or about the very next day, *see* July 31 Order at 47, a supplier of Telsim, nominally suing Telsim for relatively modest amounts, obtained an *ex parte*, uncontested injunction barring the transfer of Telsim stock to this Court. At least two other such injunctions were thereafter obtained by similar suppliers in other parts of Turkey. *See* Order, dated August 22 2002, at 9-10. Although fully aware of these injunctions, the defendants expressly ordered their United States counsel not to reveal them to this Court. *See* July 31 Order at 47. Only after this Court issued its order granting the preliminary injunction and ordering transfer of the shares did defendants reveal the Turkish injunctions, contending that they were now barred from transferring the shares. *Id.* at 47, 143.

Defendants nonetheless assured this Court that they would take meaningful steps to overturn or modify the Turkish injunctions (which, seemingly, had no supportable rationale, since the amounts allegedly owed the suppliers could easily be satisfied by ordinary bonds). *See* Order, dated August 22, 2002, at 11-12. Subsequent evidence, however, revealed that the defendants only made a patently sham attempt to do so, thus providing further evidence that, as this Court subsequently held, the injunctions were collusively procured. *Id.* [1]

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[1] More generally, the degree to which defendants have misled this Court is, frankly, unparalleled in this Court's experience. Nor is this con-

Moreover, any doubt about the defendants' hypocrisy and contumacious intent was laid to rest when the Court suggested that, in place of the transfer of Telsim stock, defendants simply post a bond in this Court. *See* Order, dated October 15 2002, at 2 n. 1. With virtually no explanation, defendants declined to post such a bond, in any amount, preferring to continue their contempt of court.

Now, in their most recent papers, defendants submit an affidavit of Turkish counsel averring that since the injunctions in question were not appealed, the injunctions have now become final, and that therefore this Court's latest order to defendants to take the necessary steps to undo the injunctions comes too late. But, of course, the failure of defendants to appeal the injunctions in question was not only itself a violation of earlier orders of this Court but, more importantly, is just one more proof of the collusive nature of the injunctions.

Without reiterating further the many other such examples described in the prior orders of this Court, the point is that the evidence is plain that the defendants undertook fraudulent and collusive actions in Turkey to procure sham injunctions whose sole purpose was to avoid compliance with this Court's orders and proceedings, and that accordingly the claim that this Court's disregard of defendants' machinations somehow constitutes error is without substance.

(5) "Entry of Judgment Against Non-Parties" (Def.Mem.6-7). The defendants next claim that the "[t]he Court has entered judgment for over $4 billion against 130 companies," Def. Mem. at 6, most of which were not parties to the case, and that it has done so without particularized evidence sufficient to pierce the corporate veil. *Id.* This is doubly erro-

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clusion limited to this Court. Magistrate Judge Maas, to whom much of the discovery in this case was referred, ultimately concluded that the defendants had been "lying to the Court since I got involved in this case." Transcript, Hearing of November 18, 2002, at 4. The English Court that imposed criminal contempt terms of imprisonment on two of the defendants reached similar conclusions. *See* July 31 Order at 151-53.

neous. First, the Court only entered judgment against the parties to this case. Second, the Court held that such judgment could be collected not only from the defendants' personal assets but also from assets of entities over which the defendants "exercise complete domination and control and through which domination defendants committed the foregoing frauds against plaintiffs," July 31 Order at 172, thus satisfying the two classic indicia of veil-piercing. *See, e.g., Matter of Morris v. N.Y. State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, 1160-1161 (1993). The Court made detailed findings, moreover, that at least 130 of defendants' companies, listed by name, satisfied these criteria because the defendants operated their entire economic empire as a single enterprise, totally controlled by them, and used by them to disguise the transfer of monies and assets. *See* July 31 Order at 67-81. While, obviously, attachments and the like are not self-executing remedies, and thus (as has already occurred in this case) any entity whose assets are attached has ample opportunity to contest the attachment as to it, the strong evidence that the Uzan defendants make use of their tightly-controlled web of companies as a device to facilitate their frauds is more than sufficient to justify the aforementioned order.

(6) "Improper Equitable Judgment" (Def. Mem. at 6). Defendants next argue that if they fail to comply with the Court's direction that they promptly transfer Nokia's portion of Telsim stock (7.5%) to the registry of this Court, then, under the Court's order, they will suffer as a sanction a judgment of $1.7 billion, which is twice what Nokia is owed and "bears no relation to the harm Nokia would allegedly suffer should Defendants not transfer 7.5% of Telsim's shares to the registry of the Court." (Def. Mem. at 7).

To begin with, this point only becomes relevant if defendants once again act in contempt of the Court's orders to transfer Telsim stock, the only impediment to which is the collusively obtained injunctions that defendants could readily

satisfy by paying their suppliers. But as already indicated, defendants have repeatedly evidenced their contempt for the prior such orders of the Court, refusing even the alternative of posting a bond in lieu of transferring the shares.

Thus, to have any hope of compelling compliance, as well as of compensating Nokia for losses sustained, the Court must resort to more stringent measures. *See United States v. United Mine Workers of America*, 330 U.S. 258, 303-304, 67 S.Ct. 677, 91 L.Ed. 884 (1947). Since the Telsim stock was supposed to compensate Nokia for the net monies owed in event of default, and since defendants have refused to provide meaningful discovery as to the financial worth of Telsim (and therefore the value of its stock), a reasonable measure of the compensatory aspect of the sanction is the net monies owed plus interest, and a reasonable measure of the additional amount needed to coerce compliance is to double that amount, which, as set forth in the July 31 Order at 171, is how the $1.7 amount was arrived at. (By contrast, in *United Mine Workers*, the coercive portion of the sanction award was a full four times the compensatory portion. *Id.* at 305, 67 S.Ct. 677.) Accordingly, the $1.7 billion sanction is both well grounded and fully within accepted limits.

(7) "Substantial Remedial Defects" (Def. Mem. at 7-8). Finally, in the most conclusory of all their points, defendants claim that the injunctive relief granted to MCC "is an improper adjunct to the $4 billion in monetary damages" (Def. Mem. at 7) because a treatise on equitable remedies says that it is "not appropriate," *id.*, and that, furthermore, the punitive damages award somehow violates Illinois law and due process. This is absurd. The injunctive relief largely consists of the classic relief of making available to MCC for satisfaction of its monetary judgment the collateral in which it had an interest or, in light of defendants' conversion of the collateral, the converted equivalent thereof; and the punitive damages are a very modest multiple of the compensatory damages. *See* July 31 Order at 167-69.

In sum, defendants have not even satisfied the first requirement of a stay pending appeal, *i.e.*, a strong showing of success on the merits. In light of the history of this case, it is also clear that they likewise cannot satisfy at least two of the three additionally required elements, *i.e.*, avoiding substantial injury to the adversary parties and fulfilling the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776-77, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).[2] But the problem of injury to plaintiffs might be largely obviated, at least as to MCC, if defendants were willing to post a bond equal to the amount of the judgment, *i.e.* $4.2 billion. Pleading a kind of billionaires' poverty, defendants claim this is beyond their means—though their repeated failure to provide meaningful financial discovery makes this claim impossible to evaluate. Nonetheless, plaintiffs, in an effort to expedite matters, have agreed to accept a bond in the much-reduced sum of $1 billion. *See* Pl. Mem. at 20. Yet defendants, incredibly, maintain they should not have to post any bond at all.

Consequently, for all the foregoing reasons, the prong of the instant motion requesting a general stay pending appeal is hereby denied. With respect to the second prong requesting a short-term stay, however, the Court agrees to stay execution of judgment for an additional week, that is, until August 15, 2003. If, during the week, defendants post a supersedeas bond of $1 billion, then, on consent, the Court will stay execution of the judgment pending appeal. Alternatively, even if defendants do not post such a bond, the delay of one week will give them ample time to apply for a stay to the Court of Appeals.

SO ORDERED.

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[2] It is also doubtful to what extent defendants can satisfy the other element, *i.e.*, irreparable injury to the party seeking the stay, since defendants' prior conduct suggests that they do not intend to satisfy the judgment in any event.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed January 24, 2003]

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02 Civ 0666 (JSR) (FM)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

DEFENDANTS' STATEMENT OF INTENTION REGARDING THE TRIAL SCHEDULED FOR FEBRUARY 10, 2003

Defendants hereby inform the Plaintiffs and the Court that they will not introduce any evidence or conduct any examinations or present any witnesses in connection with the trial scheduled to commence on February 10, 2003. Nor do Defendants intend to appear, in person or through counsel, at any time during the scheduled trial.

The injunctions issued by the Kucukcekmece (Attachment A, with official translation) and Hayraboglu (Attachment B, with official translation) courts in the Republic of Turkey preclude the Defendants from participating in any proceeding on the merits of this lawsuit, just as these injunctions forbid the Plaintiffs from prosecuting this and other actions around the world. Notwithstanding the prior rulings of this Court, the Defendants and Telsim, as citizens of the Republic of Turkey, profess their right under the Constitution and laws of Turkey

to seek the assistance of the Turkish Courts to effectuate their arbitration rights and to oppose the jurisdiction of the Courts of the United States over the subject matter of this case and over the person of the Defendants and Telsim. As citizens and domiciliaries of the Republic of Turkey, moreover, the Defendants and Telsim are bound to obey the lawful orders of the Turkish Courts that are directed toward them, and any failure to do so would subject the Defendants to criminal sanctions in Turkey.

In addition, the Defendants have asserted that the District Court is without jurisdiction while the appeal of this Court's denial of their motion to compel arbitration and grant of Plaintiffs' motion to enjoin arbitration is pending before the Second Circuit. More broadly, the Defendants further continue to contest the jurisdiction of this Court and will oppose all efforts to enforce any judgment abroad.

Respectfully submitted,

Dated: New York, New York
January 24, 2003

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(3)

Supreme Court, U.S.
FILED
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No. 04-1255

IN THE

Supreme Court of the United States

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AYSEGUL AKAY, *ET AL.*
Petitioners,

v.

MOTOROLA CREDIT CORP. AND NOKIA CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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9 U.S.C. § 16(a) ..... *passim*

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the courts of appeals are split on whether a non-frivolous appeal pursuant to Section 16(a) of the FAA divests district courts of jurisdiction to conduct a trial. Nor do they contest the importance of this issue, or the state of confusion among the lower courts. Instead, respondents contend this ripe split is not implicated here because the district court initially—and improperly—characterized petitioners' Section 16(a) appeal as "frivolous." In fact, both the court of appeals and the district court itself have since acknowledged that the Section 16(a) appeal presented difficult, non-frivolous issues. For that reason, the court of appeals assigned no significance to the district court's improper designation of petitioners' appeal as frivolous. Rather, it concluded that the merits of a case are not "involved in" an arbitrability appeal under Section 16(a), and that district courts therefore are not divested of jurisdiction over the merits pending such appeals. That holding squarely conflicts with the decisions of other courts of appeals, as the court below expressly acknowledged. This case presents that conflict in the only circumstance that it could arise before this Court.

This international case also squarely presents whether the FAA or the law chosen by a general choice-of-law clause governs questions of arbitrability. Precisely because this is an international case, it offers an excellent vehicle for deciding that question.

I. This Case Offers An Ideal Vehicle For Resolving The Circuit Split Over The Jurisdiction of District Courts Pending Non-Frivolous Section 16(a) Appeals.

A. The court below expressly acknowledged that its holding in this case directly conflicts with the decisions of other circuits. In this case, the Second Circuit held that non-frivolous interlocutory appeals pursuant to Section 16(a) do not divest district courts of jurisdiction to proceed on the merits while the appeal is pending. Pet. App. 25a. Other courts of appeals, however, have reached the opposite

conclusion. These courts have held that further proceedings by the district court are "involved in" an appeal that presents the precise issue of whether, in view of an agreement to arbitrate, there should be any district court proceedings at all. Pet. 14-16. Respondents offer *no* defense of the holding of the court below (and the Ninth Circuit) that "further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration . . . ." Pet. App. 25a. Instead, they contend that "there is no split among the circuits on the facts presented here, where the district court found the appeal frivolous and the court of appeals refused to issue a stay." Br. in Opp. 14. That contention is incorrect.

1. Although courts considering the jurisdictional impact of Section 16(a) appeals have recognized that a frivolous interlocutory appeal may not confer jurisdiction on a court of appeals, that is true only if the appeal is in fact frivolous. As Judge Easterbrook explained in *Bradford-Scott Data Corp.* v. *Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997), "the court of appeals or the district court may declare that the appeal is frivolous, *and if it is* the district court may carry on with the case." *Id.* at 506 (emphasis added); cf. *United States* v. *Brooks*, 145 F.3d 446, 456 n.6 (1st Cir. 1998) (explaining that a district court's finding of frivolousness in the context of an interlocutory appeal "would not be conclusive" as to the jurisdictional impact of the appeal because "frivolousness is a question of law and thus subject to de novo review").

In *Bombardier*, moreover, the D.C. Circuit recognized, in the course of deciding an unsuccessful Section 16(a) appeal, that a stay is "unnecessary, because [appellant's] appeal . . . was facially non-frivolous and thus the district court was divested of jurisdiction over the underlying action until we could determine the threshold issue of whether the dispute between the parties is arbitrable under the FAA." *Bombardier Corp.* v. *Nat'l Ry. Passenger Corp.*, 333 F. 3d 250, 252 (D.C. Cir. 2003) (citing *Bombardier Corp.* v. *Nat'l*

Ry. Passenger Corp., No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002)). Similarly, in *Blinco* v. *Green Tree Servicing, L.L.C.*, 366 F.3d 1249 (11th Cir. 2004), the Eleventh Circuit recognized that, because the "'filing of a notice of appeal is an event of jurisdictional significance . . . [that] divests the district court of its control over those aspects of the case involved in the appeal,'" *id.* at 1251 (quoting *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)), a district court should not exercise control over a case "upon the filing of a non-frivolous appeal under [Section] 16(a)." *Id.*[1]

Consequently, an erroneous district court declaration of frivolousness is not controlling on appeal, and an appellate court's failure to issue a stay following that erroneous declaration does not vest the district court with jurisdiction that an appeal otherwise takes away. Under *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998), a non-frivolous filing is sufficient to grant a court jurisdiction. The filing of a non-frivolous appeal under Section 16(a) thus grants *the court of appeals* jurisdiction and *deprives* the district court of jurisdiction. See *Griggs*, 459 U.S. at 58. A district court's mistaken claim of frivolousness cannot give it jurisdiction it does not have. Consequently, nothing cited by respondents comes close to reconciling the decision below (and the Ninth Circuit's similar ruling) with the rule that governs in the Seventh, Eleventh and D.C. Circuits.

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[1] The Eleventh Circuit's statement that it should stay litigation unless finding that a Section 16(a) appeal is frivolous, *Blinco*, 366 F.3d at 1253, does not suggest that district courts retain jurisdiction whenever the court of appeals fails, for unexplained reasons, to issue a stay following a non-frivolous appeal. See Br. in Opp. at 20. The Eleventh Circuit undoubtedly did not contemplate the type of breakdown in the appellate process that occurred here. Moreover, its recognition that the filing of a non-frivolous appeal "is an event of jurisdictional significance," *id.* at 1251 (internal quotation marks and citation omitted), makes clear that it views traditional stay practice as an orderly way to proceed, not a jurisdiction-altering process.

2. Any "frivolous appeal" exception to the general rule of divestiture is not implicated in this case because *both* lower courts expressly acknowledged that petitioners' interlocutory appeal under Section 16(a) was *non-frivolous*. The panel assigned to petitioners' interlocutory appeal accepted jurisdiction over the appeal, consolidated it with petitioners' (ultimately successful) appeal from the grant of a preliminary injunction, and remanded the arbitration issues for reconsideration in light of the "changed landscape" of the case. Pet. App. 251a, 263a. The court of appeals in this appeal expressly confirmed that petitioners' prior interlocutory appeal "was not frivolous." Pet. App. 23a. Even the district court acknowledged that "the arbitration issue" presented by petitioners' Section 16(a) appeal "was one of the more difficult issues confronting the Court." Res. App. 24a.

Respondents' suggestion that the first panel decision embraced the district court's initial view that the Section 16(a) appeal was frivolous, and their corresponding effort to dismiss the later panel's *express* statement that the interlocutory appeal was not frivolous as irrelevant "hindsight," Br. in Opp. at 15 n.4, are wishful thinking. The initial panel's unexplained failure to issue a stay cannot be read as an endorsement of the district court's declaration of frivolousness; inaction is often just that—inaction. To the extent inaction is relevant, it demonstrates that the first panel thought the Section 16(a) appeal was *not* frivolous, since it refused respondents' motion to dismiss the appeal as frivolous. More fundamentally, the nature of petitioners' Section 16(a) appeal did not change over time. The recognition, by both the second panel and the district court itself, that the interlocutory appeal raised non-frivolous issues forecloses any claim that the initial appeal was frivolous.

B. Respondents raise a number of other claims in an effort to show that "this case would be a poor vehicle for review." Br. in Opp. 16. Those claims were properly rejected by the court below and pose no impediment to resolution of the conflict squarely presented by this case.

1. Contrary to respondents' contention (Br. in Opp. 17), it makes no difference that the district court entered its final judgment after the court of appeals had remanded the Section 16(a) appeal. The district court's final judgment was founded on a *trial*, on *orders* enjoining foreign arbitrations, on sanctions orders, and on a decision *deeming defendants to have waived their right to a jury trial*, all entered *after* the defendants' Section 16 appeal had divested the district court of jurisdiction. It is well established that, where a district court conducts critical proceedings (even portions of a trial) without jurisdiction during an interlocutory appeal, the resulting judgment is a nullity. See *United States* v. *Defries*, 129 F.3d 1293, 1302-1303 (D.C. Cir. 1997) (reversing convictions because trial began before court of appeals had issued mandate over interlocutory *Abney* appeal, even though mandate had been released at time judgment of conviction entered); cf. *Brooks*, 145 F.3d at 457 (holding that steps taken by district court to empanel and swear a jury and begin trial were "nullities" because court of appeals had jurisdiction over interlocutory appeal pursuant to 18 U.S.C. § 3731). The fact that the district court had recovered jurisdiction when it entered final judgment does not render valid the acts it took before recovering jurisdiction. Cf. *Grupo Dataflux* v. *Atlas Global Group L.P.*, 541 U.S. 567 (2004) (reversing judgment because district court lacked subject-matter jurisdiction at the time case commenced, although the jurisdictional defect had been cured by the time judgment was entered). In any event, the court below attached no significance to the date of the district court's final judgment, and there is thus no reason this Court should now. *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (Court ordinarily does "not decide * * * issues not decided below").[2]

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[2] The unique removal jurisprudence at issue in *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972), has no bearing here. Moreover, no party raised a jurisdictional objection before trial or judgment in *Grubbs*. *Id.* at 701. In contrast, petitioners consistently objected from